Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ANGEL ENRIQUE VILLEDA ALDANA, JORGE AGUSTIN PALMA ROMERO, OSCAR LEONEL GUERRA EVANS, LYIONHEL McINTOSCH RODRIGUEZ, MAREL MARTINEZ, GUMERZINDO LOYO MARTINEZ, and RIGOBERTO ALVAYERO HERNANDEZ,

Petitioners,

vs.

FRESH DEL MONTE PRODUCE, INC. d/b/a DEL MONTE FRESH PRODUCE COMPANY and COMPANIA DE DESARROLLO DE GUATEMALA, S.A. (BANDEGUA),

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States has an interest in upholding its obligations under international law by providing a forum for claims of human rights violations through the Alien Tort Statute ("ATS") and Torture Victims Protection Act ("TVPA").

2. Whether dismissal on *forum non conveniens* grounds of a case by U.S. residents under U.S. statutes against a U.S. corporation contradicts the United States' interest in governing the conduct of its business entities operating outside of its borders.

3. Whether under this Court's decision in *Piper Aircraft Co. v. Reyno*, courts should afford weight to the choice of forum of non-citizen U.S. residents' whose claims relate to the human rights violations for which the United States granted them asylum.

PARTIES TO THE PROCEEDING

The parties to the proceeding are: Petitioners, Angel Enrique Villeda Aldana, Jorge Agustin Palma Romero, Oscar Leonel Guerra Evans, Lyionhel McIntosch Rodriguez, Marel Martinez, Gumerzindo Loyo Martinez, and Rigoberto Alvayero Hernandez, all individuals; and Respondents, Fresh Del Monte Produce, Inc. d/b/a Del Monte Fresh Produce Company and Compania de Desarrollo de Guatemala, S.A. (Bandegua), both corporations.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The August 13, 2009 opinion of the Eleventh Circuit affirming the lower court's dismissal is reported at 578 F.3d 1283 and reprinted in this petition at Appendix A. The court of appeals order denying petitioner's timely petition for rehearing and rehearing en banc was entered on February 9, 2010 and is reprinted at Appendix C to this petition. The October 16, 2007 order of the United States District Court for the Southern District of Florida dismissing the case is not reported, but is available at 2007 WL 3054986 and is appended to this petition at Appendix B.

JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on August 13, 2009. A timely petition for rehearing and for rehearing en banc was denied on February 9, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 (note), is a more recent iteration of Congress' interest in providing a judicial remedy for victims of two specific violations: torture and extrajudicial killing. Unlike the ATS, the TVPA is available to United States citizens and residents. The TVPA is reprinted as Appendix D to this petition.

STATEMENT OF THE CASE

Petitioners are U.S. residents who formerly served as trade union leaders at Respondents' banana plantation in Guatemala. Respondents are Fresh Del Monte Produce Inc., d/b/a Del Monte Fresh Produce Company, and Compania de Desarollo de Bananero de Guatemala, S.A. ("Bandegua").P Fresh Del Monte Produce Inc. is a Delaware Company with its principal place of business in Coral Gables, Florida. Bandegua is a wholly owned subsidiary of Fresh Del Monte Produce Inc.

In 2001, Petitioners brought suit against Respondents in the United States District Court for the Southern District of Florida asserting causes of action for torture under the ATS and TVPA and arbitrary detention, crimes against humanity, and cruel, inhuman and degrading treatment under the

ATS, as well as various state tort law causes of action based on events that took place in Guatemala in October 1999.

The district court first granted Respondents' motion to dismiss based on a failure state a claim under Fed. R. Civ. P. 12(b), holding that Petitioners had not alleged sufficient facts to establish torture under the TVPA or torture, arbitrary detention, crimes against humanity, and cruel degrading and inhuman treatment under the ATS. Petitioners appealed the dismissal, and on July 8, 2005, the Eleventh Circuit reversed major portions of the lower court's decision and remanded the case for further proceedings on Petitioners' claims for torture under both the ATS and TVPA. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

Upon remand, Respondents renewed a motion to dismiss based on *forum non conveniens* the district court had previously denied. On October 16, 2007, more than six years after Petitioners first filed their complaint, the district court granted Respondents' motion to dismiss for *forum non conveniens*, finding that Guatemala afforded Petitioners an adequate alternative forum for the resolution of their claims and that all of the relevant private interest and public interest factors weighed heavily in favor of adjudicating the dispute in Guatemala. The Eleventh Circuit specifically endorsed the district court's reasoning that preventing forum shopping and protecting comity between the U.S. and other nations are greater policy interests than the U.S. interest in

providing a forum to victims of torture and other international human rights violations. In affirming the district court's decision, the Eleventh Circuit became the first of any U.S. Circuit Court to uphold dismissal on grounds of *forum non conveniens* of a suit brought by U.S. residents against a U.S. company under U.S. statutes.

The Eleventh Circuit's ruling creates a clear circuit split and warrants review on certiorari for three reasons. First, the Eleventh Circuit's decision negates the strong federal interest in enforcing international law obligations via ATS and TVPA cases, which Congress unequivocally expressed in passing the TVPA. Second, the Eleventh Circuit's decision departs from established *forum non conveniens* analysis by failing to give adequate weight to the strong federal interest in governing the conduct of its business entities, like Respondents, who are operating globally. Third, the Eleventh Circuit's decision undermines the strong federal interest in providing a forum to U.S. residents who are victims of egregious human rights violations. These issues are of first impression to this Court, which has not squarely addressed questions of *forum non conveniens* in nearly three decades. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

A. Statement of Facts

This case arises out of a violent labor dispute that took place in Guatemala in 1999. At that time, Petitioners were officers in SITRABI, a national trade union of plantation workers that

was negotiating a collective bargaining agreement for workers at a Bandegua-owned banana plantation, located in the municipality of Morales, Izabal. While the negotiations were taking place, Bandegua terminated 918 workers and SITRABI responded by filing a complaint in the Labor Court of Guatemala.

Petitioners allege that on or before October 13, 1999, Bandegua hired or established an agency relationship with a private, armed security force and that on October 13, 1999, Respondents' agents met with the security force to threaten with death and other violence Petitioners and other SIRABI leaders. That evening, a security force of more than 200 heavily armed men arrived at SITRABI's headquarters in Morales, Izabal, held two Petitioners hostage, and threatened to kill them. During the course of the evening, other SITRABI leaders were lured or forced to come to SITRABI headquarters where they were detained.

While at SITRABI headquarters that night, Petitioners were threatened by a man who claimed to be president of the municipal chamber of commerce and who blamed Petitioners for the area's economic decline on the theory that union activity could cause Del Monte to abandon the plantation. A mayoral candidate and the mayor of Morales also came to union headquarters and a decision was made that two Petitioners would be taken to a radio station where they would be forced to denounce the union. At the radio station, the Petitioners were forced at gunpoint to denounce the

union, announce their resignation for the union and proclaim that the labor dispute was over.

The security forces later returned Petitioners to SITRABI headquarters where, at gunpoint, Petitioners signed resignation forms provided by Del Monte or Bandegua. The leader of the security forces warned petitioners that they would be killed if they did not leave Guatemala. After eight hours of detention, Petitioners were released.

Petitioners fled Morales for Guatemala City, where five Petitioners testified against their attackers in a criminal prosecution. When that prosecution resulted in only minor fines against the leaders of the violent group, leaving them free to retaliate, Petitioners fled to the United States where the U.S. Department of State granted each Petitioner asylum. Petitioners resettled in the United States where they continue to reside. Throughout the course of their case, Petitioners were legally residing in the United States.

B. Proceedings Below

Petitioners filed their complaint in the United States District Court for the Southern District of Florida on August 2, 2001. The complaint asserted causes of action for torture under both the TVPA and ATS in addition to causes of action under the ATS for arbitrary detention, crimes against humanity, and cruel, inhuman and degrading treatment and for various claims under Florida's tort laws.

In 2003, Respondents moved to dismiss the case on the grounds of *forum non conveniens*. The district court denied the motion, *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, No. 01-3399, (S.D. Fla. June 5, 2003), but subsequently dismissed Petitioners' complaint, holding that the conduct alleged did not amount to torture under the TVPA or ATS and that the court lacked diversity jurisdiction. *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F.Supp.2d 1285, 1308 (S.D. Fla. 2003). The trial court also declined to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. *Id.*

Petitioners appealed the dismissal to the Eleventh Circuit, while simultaneously bringing their state law claims in Florida's circuit court in Dade County. Respondents moved in state court to dismiss the case on *forum non conveniens* grounds. The state court granted the motion to dismiss on *forum non conveniens* grounds and was affirmed by an intermediate appellate court. *Aldana v. Fresh Del Monte Produce Inc.*, 922 So.2d 212 (Fla. Dist. Ct. App. 2006) (table).

In the interim, an Eleventh Circuit panel had reversed the district court's dismissal of Petitioners' torture claims under the TVPA and ATS and remanded the case to the district court for consideration of those federal claims. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d at 1253 (per curiam), *en banc reh'g denied*, 452 F.3d 1284 (11th Cir. 2006), *cert. denied*, 549 U.S. 1032 (2006).

Upon remand, Respondents again moved to dismiss on *forum non conveniens* grounds. The district court referred the motion to dismiss to a magistrate judge, who, after holding a lengthy hearing, recommended denying the motion due to the strong U.S interest in adjudicating TVPA and ATS cases and in deference to the Petitioners' choice of a U.S. forum as U.S. residents. However, the district court rejected the magistrate's decision, relying instead on the Florida state court's decision granting Respondents' *forum non conveniens* motion. *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, No. 01-3399-CIV, 2007 WL 3054986 (S.D.Fla. Oct. 16, 2007). In performing its *forum non conveniens* analysis, the district court found that the private and public interest factors weighed in heavily favor of adjudication of the matter in Guatemala.

In a panel decision, the Eleventh Circuit upheld the district court's dismissal. *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009). Over an emphatic dissent by Judge Kravitch, the Court of Appeals specifically endorsed the district court's reasoning that the public interest in preventing forum shopping and protecting comity weighed more heavily in favor of dismissal than the U.S. interest in providing a forum for ATS and TVPA cases. *Id.* at 1298-99. In weighing the private interest factors, the Court of Appeals gave little weight to Petitioners' choice of forum, reasoning that other factors such as access to evidence, the inability of the court to compel unwilling witnesses in Guatemala to testify and

other "practical and logistical issues" favored dismissal. *Id.* at 1294.

Petitioners timely filed a petition for rehearing and for rehearing en banc, which the Eleventh Circuit denied on February 9, 2010.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CLEAR SPLIT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS AS TO THE WEIGHT ENTITLED THE UNITED STATES' INTEREST IN UPHOLDING ITS OBLIGATIONS UNDER INTERNATIONAL LAW.

The Eleventh Circuit decision failed to adequately consider the important and fundamental public interest of the United States in upholding its obligations under international law by adjudicating Petitioners' claims of human rights violations. In passing the TVPA, Congress noted the overarching federal interest in providing a U.S. forum for ATS and TVPA claims. As the legislative history for the TVPA makes clear,

> In explaining the raison d'etre for section 1350, the House Report recalls that the ATS "permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations'" and expresses the

> intention to "establish an unambiguous and modern basis for a cause of action...not limited to aliens, for torture and extrajudicial killing..." by providing an "explicit–and preferably contemporary–grant by Congress of a private right of action before U.S. courts . . ."

H.R. Rep. 367 (I), 102nd Cong., 1st Sess. 1991, 1992 U.S. S.C.A.N. 84, 1991 WL 255964 (emphasis added).

The federal interest in addressing violations of the law of nations is echoed in the jurisprudence of every Circuit to have considered the issue. For example, the Ninth Circuit has recognized that "[t]he nature of certain allegations and the gravity of the potential violations of international law [] trigger... our historical commitment to upholding customary international law. Some of the claims - torture, crimes against humanity, and war crimes - [] implicate matters of 'universal concern,' generally described as offenses 'for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders.'" *Sarei v. Rio Tinto, PLC,* 550 F.3d 822, 831 (9th Cir. 2008) (citing *Kadic v. Karadic*, 70 F. 3d 232, 240 (2nd Cir. 1995) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES (1996) § 404). In *Bauman v. DaimlerChrysler Corp.*, the Ninth Circuit held, "[a]lthough the [human rights violations] at issue did not take place in [the forum state] and although the plaintiffs are not [] residents [thereof], the forum state does have a

significant interest in adjudicating the suit." 2009 WL 2634795, *14 (9th Cir. 2009). That court recognized that providing a forum "further[s] fundamental substantive social policies...." *Id.* at *14 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). The social policy in cases arising under the ATS and TVPA is to address "violations of international [human rights] law... - 'a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.'" *Id.* at *14 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

To uphold this social policy, "American federal courts . . . have a strong interest in adjudicating and redressing international human rights abuses." *Id.* at *14 (citing *e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000) (holding, in the context of *forum non conveniens*, that the TVPA "has ... communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business.")). According weight in *forum non conveniens* analyses to the U.S. interest in providing a forum to address human rights violations is essential if that interest is to mean anything in practice. The Second Circuit warned that "[i]f in cases of [] violation[s] of international law our courts exercise their jurisdiction conferred by the [ATS] only for as long as it takes to dismiss the case for *forum non conveniens*, we will have done little to enforce the standards of the law of nations." Wiwa, 226 F.3d at 106.

The U.S. interest in addressing violations of international prohibitions disfavors dismissal of ATS and TVPA cases on *forum non conveniens* grounds.[1] *Rio Tinto*, 550 F.3d at 831. The passage of the TVPA "expresses a policy favoring receptivity by our [district] courts to such suits." *Wiwa*, 226 F.3d at 105. The court recognized that the U.S. interest embodied in the ATS and TVPA must be given weight as a significant public interest factor in *forum non conveniens* analysis. *Id.* at 106. Dismissing such cases undermines Congress' intent to provide a federal forum to address these most serious of offenses. *See also, Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2nd Cir. 1998); *see also, Arce v. Garcia*, 434 F.3d 1254, 1261-62 (11th Cir. 2006) ("absent [such] cause[s] of action in the United States, some of the most egregious cases of human rights violations might go unheard.").

The Eleventh Circuit's decision conflicts with established precedent. Rather than give proper effect to the Congressional intent of the ATS and TVPA, the decision concluded that "preventing forum shopping and protecting comity" are "greater policy interest[s]." (App. A-35-36). Were this

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[1] A *forum non conveniens* inquiry involves two steps. First, the court determines whether an adequate alternative forum exists. *Piper Aircraft*, 454 U.S. at 254 n. 22. Second, the court must balance a series of private interest factors and consider whether any public interest factors are at stake. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

reasoning to apply in every ATS and TVPA case involving foreign events, the elevation of "forum shopping" and "comity" would completely negate the well-established federal interest in providing a forum.

The Supreme Court has yet to delineate the proper weight to be accorded the interest of the United States in providing a forum for the litigation of international human rights violations in a *forum non conveniens* inquiry. The Court should grant review to resolve the conflicting interpretations of this interest between the Circuits and protect the federal interest in providing a U.S. forum for victims of torture and other human rights violations.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE FACT THAT THE ELEVENTH CIRCUIT IS THE ONLY CIRCUIT COURT TO UNDERMINE THE U.S. INTEREST IN THE ACCOUNTABILITY OF ITS CITIZENS BY UPHOLDING DISMISSAL OF A FEDERAL CLAIM BROUGHT BY U.S. RESIDENTS AGAINST A U.S. CORPORATION.

In addition to the interest in upholding its human rights obligations, discussed *supra*, the United States has an important interest in holding accountable its own citizens – individual and corporate – for egregious violations they commit outside of its borders. *See, e.g., Doe v. Exxon Mobil Corp.*, 2006 WL 516744, at *2 (D.D.C. 2006)

("[u]ltimately, the United States, as leader of the free world, has an overarching vital interest in the safety, prosperity, and consequences of the behavior of its citizens, *particularly its super-corporations* conducting business in one or more foreign countries.") (emphasis added). The decision at issue is the only one of its kind to uphold a dismissal of a federal claim brought by U.S. residents against a U.S. company and, in addition to undermining the U.S. interest in accountability, is a clear departure from *forum non conveniens* jurisprudence in other Circuits, as well as prior decisions in the Eleventh Circuit.

Other circuits have recognized that neither the application of foreign law nor the location of witnesses and evidence abroad "[i]s considered sufficient to overcome the policy in favor of hearing suits *between American residents* in a United States court." *See Founding Church of Scientology of Washington, D. C. v. Verlag*, 536 F.2d 429, 436 (D.C. Cir. 1976) (emphasis added) (citing *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 646 (2d Cir. 1956)); *Horovitz v. Renault, Inc.*, 162 F. Supp. 344, 346 (S.D.N.Y.1958); *Garrity v. United States*, 67 F.Supp. 821, 107 (Ct. Cl. 1946). Nothing about the ATS or TVPA changes this established rule; in such cases where *forum non conveniens* dismissals were upheld, either the plaintiff or the defendant was a citizen or resident of a *foreign* state. *See, e.g., Turedi v. Coca Cola Co.*, 2009 WL 1956206, *2 (2nd Cir. 2009) (dismissing for *forum non conveniens* where "none of the plaintiffs are U.S. citizens, and defendant CCI is a Turkish company with its principal place of business in Istanbul and

has no alleged contact to the United States."); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (2nd Cir. 2001) (plaintiffs were citizens and residents of Ecuador and Peru).

In contrast, where the plaintiffs and the corporation were both U.S.-based, dismissal on *forum non conveniens* grounds has never been upheld. *See, e.g., Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2nd Cir. 2009) (remanding the *forum non conveniens* issue where defendant was a U.S. corporation); *Bigio v. Coca Cola Co.*, 448 F.3d 176, 179-80 (2nd Cir. 2006) (reversing the district court's dismissal on *forum non conveniens* where the defendant was a U.S. corporation); *Jota*, 157 F.3d at 159 (remanding and directing the district court to consider in its *forum non conveniens* analysis Plaintiffs' "argu[ment] that the instant case involves a claim pursuant to the ATS, and that to dismiss the present case would frustrate Congress' intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations").

The fact that the United States is the Respondents' home forum must be afforded significant weight, particularly where, as in ATS and TVPA cases, "the suit is primarily over whether a United States company should be liable in damages." *See, e.g., Bigio*, 448 F.3d at 179-80; *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 74 (2nd Cir. 2003). In reversing a lower court's failure to grant deference to a foreign plaintiff's choice of the home forum of a U.S. defendant, the Third Circuit held that "suing the

defendant in [its] home forum where [its] corporate headquarters, headquarters of the division in question, and research laboratories are located [] has considerable weight in showing that the plaintiff's choice of forum was based on convenience." *Lony v. Dupont*, 886 F.2d 628, 634 (3rd Cir. 1989). The Eighth Circuit has also recognized that "where the forum resident seeks dismissal, this fact should weigh strongly against dismissal." *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991) (citing *Manu Int'l, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 67 (2nd Cir.1981) (finding abuse of discretion in dismissing case in which defendant's home office was located in forum); *see also, Verlag*, 536 F.2d at 435 (finding of "great significance" that both plaintiff and defendant are residents of the U.S.).

The great weight of ATS and TVPA jurisprudence upholds the U.S. interest in adjudicating cases against U.S. companies, particularly where "the suit is primarily over whether a United States company should be liable in damages." *See, e.g., Bigio*, 448 F.3d at 179-80. In this case, Respondent operates all over the United States and is headquartered in South Florida, where it maintains major business facilities. Petitioners brought their case in South Florida, despite the fact most of them reside in California, expecting that Respondent would not be heard to complain that South Florida was an inconvenient choice. As the dissent recognized, a *forum non conveniens* dismissal is inappropriate under these circumstances. (App. A-52) (Kravitch, P., *dissenting*). ("Indeed, it is perfectly reasonable for

[Petitioners] to have brought this lawsuit in the court of the country of their residence, particularly because United States' law governs their claims and one of the [Respondents], Del Monte, is incorporated and located in the United States"). In assessing the dismissal, the Eleventh Circuit ignored the fact that the dispute at issue involves claims brought by U.S. residents against a U.S. corporation for violations of federal law and thus ignored prior precedent and the overwhelming U.S. public interest in litigating such claims in the United States.

III. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CLEAR SPLIT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS AS TO THE WEIGHT ENTITLED THE UNITED STATES' INTEREST IN PROVIDING RESIDENTS TO WHOM IT HAS GRANTED ASYLUM A CHOICE OF FORUM.

A. The Eleventh Circuit's Decision Contravenes *Gilbert*

The Eleventh Circuit's failure to accord proper weight to Petitioners' choice of forum conflicts with other circuits which have held that the U.S. residence of a plaintiff is a significant private interest factor that must be taken into consideration in a *forum non conveniens* inquiry. This failure is a severe departure from this Court's admonition that, in weighing the private interest factors, a plaintiffs' choice of forum should rarely be

disturbed "unless the balance is strongly in favor of the defendant." *Gilbert*, 330 U.S. at 508.

The Eleventh Circuit's decision did not accord due weight to the Petitioners' choice of forum. Instead, the court held that the prevention of forum shopping and protection of comity represented a "greater policy interest" than upholding the forum Petitioners' selected for their ATS and TVPA claims. (App. A-35) (*Aldana*, 578 F.3d at 1299). The court upheld the lower court's dismissal despite the void in the record of any suggestion Petitioners had engaged in forum shopping or that comity concerns were an issue in this particular case. (App. A-51-52) (*Aldana*, 578 F.3d at 1305 (Kravitch, J., dissenting)). Ignoring the fact that after fleeing Guatemala to avoid threatened violent retaliation and testifying in a Guatemalan criminal case against their torturers, the Petitioners won asylum in the United States and filed in U.S. court against U.S. defendants, the Eleventh Circuit characterized the dispute at issue as "quintessentially Guatemalan." Without explanation, the court reversed the presumption set forth in *Gilbert* and assumed that Petitioners' choice of forum was motivated by improper forum shopping considerations. To support its conclusion that comity could be compromised, the court offered only speculation: "it is not hard to imagine that Guatemala might regard trying this case in an American court as a tacit acceptance of the [Respondents'] assertion that the Guatemalan judicial system is too corrupt to justly resolve the dispute." (App. A-36) (*Aldana*, 578 F.3d at 1299).

The Second Circuit has recognized that victims of violations of international law have sound reasons to choose a U.S. forum and that foreign nations' taking offense at accusations of human rights abuses within their borders is to be expected. *Wiwa*, 226 F.3d at 106 ("Such suits [in foreign countries] are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought.") In fact, the ATS and TVPA are, in part, intended to address the difficulties of bringing such suits abroad.

The Eleventh Circuit failed to recognize the impact of policy inherent to ATS and TVPA cases on *forum non conveniens* inquiries or afford proper weight to petitioners' choice of forum as mandated by *Gilbert*.

B. The Case Calls for the Court to Clarify its Guidance in *Piper Aircraft* Regarding Choice of Forum by a U.S. Resident

In *Piper Aircraft*, this Court addressed the weight to be accorded a non-citizen U.S. resident's choice of forum, stating that "Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum." 452 U.S. at 256 n.23. The Court also noted that a U.S. resident's choice of forum should not be accorded the same weight as

that of a U.S. citizen's. *Id.* at 255-56. Unlike the present case, *Piper Aircraft* did not address claims of non-citizen U.S. residents to whom, based on the facts at issue in the case and following cooperation with the foreign country they fled, the United States granted asylum.

Subsequent decisions strongly suggest that the distinction between U.S. citizens and non-citizen U.S. residents has lost all force over the years since *Piper Aircraft*. In 2000, the Second Circuit noted that "[d]uring the last two decades, our caselaw and that of the Supreme Court has clearly and unambiguously established that courts should offer greater deference to the selection of a U.S. forum by U.S. resident plaintiffs when evaluating a motion to dismiss for forum non conveniens." *Wiwa*, 226 F.3d at 102. More recently, the Ninth Circuit unequivocally interpreted *Piper Aircraft* to support the proposition that "[i]n the context of *forum non conveniens* analysis, a resident alien . . . is entitled to the same deference as a citizen." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1177 n. 6 (9th Cir. 2006).

This Court should grant this petition so that it may clarify the weight to be accorded non-citizen U.S. residents' choice of forum in suits involving claims, such as those under the ATS and TVPA, arising from the very reason the United States granted them asylum from the country where violations of their rights took place.

C. The Eleventh Circuit's Decision Fails to Account for Judicial Resources, Undue Delay, and Prejudice Caused by Dismissal on Grounds of *Forum Non Conveniens*

Adding to the significant public interest in this case, and unrecognized by the Eleventh Circuit, is the fact that this case was filed in federal court in 2001, after Respondents twice moved for a dismissal based on *forum non conveniens* and the motions were denied. At minimum, the judicial resources expended and the undue delay and prejudice to Petitioners should have been among factors weighed in any *forum non conveniens* analysis. To uphold dismissal of a case on *forum non conveniens* grounds ***four years*** after the same court reversed a merits dismissal and discovery had begun is unprecedented. The Eleventh Circuit erred in not taking account the public interest in ensuring that significant judicial resources are not expended to no good end and not causing undue delay and prejudice to plaintiffs.

CONCLUSION

For the foregoing reasons, Appellants' Petition for a Writ of Certiorari should be granted.

Dated: May 10, 2010

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-15471

District Court Docket No.
01-03399-CV-FAM

FILED
U.S. Court of Appeals
Eleventh Circuit
Aug. 13, 2009
Thomas K. Kahn
Clerk

A True Copy / Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit
By: _____
Deputy Clerk
Atlanta, Georgia

ANGEL ENRIQUE VILLEDA ALDANA,
JORGE AGUSTIN PALMA ROMERO,
OSCAR LEONEL GUERRA EVANS,
LYIONHEL MCINTOSCH RODRÍGUEZ,
MAREL MARTINEZ, RIGOBERTO
AVAYERO HERNANDEZ,
GUMERZINDO LOYO MARTÍNEZ,
Plaintiffs-Appellants,

versus

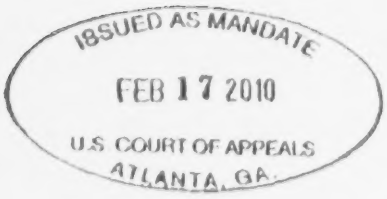
DEL MONTE FRESH PRODUCE N.A., INC.,
BANDEGUA, Compania De Desarrollo De
Guatemala, FRESH DEL MONTE PRODUCE,
INC., DEL MONTE FRESH PRODUCE
COMPANY, COMPANIA DE DESARROLLO DE
GUATEMALA, S.A. (BANDEGUA)
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 13, 2009
For the Court: Thomas K. Kahn, Clerk
By: Patch, Jeffrey



CORRECTED

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-15471

D. C. Docket No. 01-03399-CV-FAM

FILED
U.S. Court of Appeals
Eleventh Circuit
Aug. 13, 2009
Thomas K. Kahn
Clerk

ANGEL ENRIQUE VILLEDA ALDANA,
JORGE AUGUSTIN PALMA ROMERO, et al.,
Plaintiffs-Appellants,

versus

DEL MONTE FRESH PRODUCE N.A., INC.,
BANDEGUA, Compania De Desarrollo De
Guatemala, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(August 13, 2009)

Before HULL, MARCUS and KRAVITCH,
Circuit Judges.

MARCUS, Circuit Judge:

At issue in this appeal is whether the district court abused its considerable discretion in dismissing the appellants' suit on forum non conveniens grounds. The seven appellants (Angel Enrique Villeda Aldana, Jorge Agustin Palma Romero, Oscar Leonel Guerra Evans, Lyionhel McIntosch Rodriguez, Marel Martinez, Gumerzindo Loyo Martinez, and Rigoberto Alvayero Hernandez) allege that they were tortured in retaliation for their leadership of a Guatemalan national labor union in violation of the Alien Tort Act ("ATA") and the Torture Victim Protection Act of 1991 ("TVPA"). Having extensively analyzed the adequacy of a Guatemalan forum, and the various private and public interests involved in the case, the district court granted appellees' (Fresh Del Monte Produce Inc., Compañía de Desarollo Bananero de Guatemala, S.A. ("Bandegua"), and Del Monte Fresh Produce Company) motion to dismiss. After thorough review, we discern no clear abuse of discretion, and, accordingly affirm.

I. Background

A. Factual Background

The underlying suit in this case arose out of a protracted labor dispute that took place in

Guatemala in 1999. At that time, SITRABI, a Guatemalan national trade union of plantation workers, was negotiating a new collective bargaining agreement for workers at a large banana plantation owned by Bandegua, a wholly-owned subsidiary of Del Monte, located in the municipality of Morales, Izabal.

During the negotiations, Bandegua terminated 918 workers. In response, SITRABI filed a complaint in the Labor Court of Guatemala. Thereafter, Bandegua allegedly hired a private armed security force to intimidate the appellants, all of whom were SITRABI officials. Specifically, the complaint alleges that on the evening of October 13, 1999, the security force -- consisting of over 200 heavily armed men -- arrived at SITRABI's headquarters in Morales. They held two of the appellants hostage, threatening to kill them, and shoving them with guns. As the evening wore on, other SITRABI leaders were lured or forced to come to the union's headquarters, where they, too, were held hostage.

All seven appellants were then harangued by the leader of the security force, who claimed to be the president of the municipal chamber of commerce. He complained that their union activities had caused the economic difficulties that had developed in the area. The mayor of Morales and a mayoral candidate later arrived on the scene. A decision was made to take two of the appellants to a radio station. They claim they were forced at gunpoint to denounce the union, to declare that

they were resigning, and to announce that the labor dispute was over.

The two appellants were then taken back to the headquarters, where they were presented with a resignation form allegedly faxed from Del Monte or Bandegua. After signing the forms at gunpoint, the appellants were released. In all, they had been detained for roughly eight hours. They were warned by the leader of the security force that they would be killed if they refused to leave Guatemala or relocate to Mexico. All of the appellants subsequently moved to the United States. As part of an agreement with the Guatemalan government, they were granted political asylum in the United States in exchange for agreeing to testify in Guatemala against their alleged attackers.

B. Relevant Procedural History

We address the lengthy procedural history of this case because it is essential to understanding our resolution of the appeal. The appellants filed their complaint in the United States District Court for the Southern District of Florida on August 2, 2001. The complaint asserted causes of action for torture under both the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350, and the Alien Tort Act ("ATA") (or the Alien Tort Statute ("ATS")), 28 U.S.C. § 1350.[1] They also alleged causes of action arising under the ATA for arbitrary detention, crimes against humanity, and cruel, degrading, and

---

[1] The TVPA is codified as a historical and statutory note to the ATA. Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1246 (11th Cir. 2005).

inhumane treatment. In addition, the complaint advanced various claims under Florida's tort laws.

In 2003, the appellees moved to dismiss the case on the grounds of forum non conveniens. The district court denied the motion.[2] Villeda Aldana v. Fresh Del Monte Produce, Inc., No. 01-3399, slip op. (S.D. Fla. June 5, 2003). In a subsequent ruling, however, the court dismissed the complaint, holding that the conduct alleged did not amount to torture under the TVPA or ATA, and also because diversity jurisdiction was lacking. Villeda Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1308 (S.D. Fla 2003). The trial court also declined to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Id.

The appellants appealed the dismissal to this Court, while simultaneously bringing their state law claims in Florida's circuit court in Dade County. Appellees, in turn, moved the state court to dismiss on forum non conveniens grounds. One central point of contention was whether, given the concern for the appellants' safety, they would be required to attend the proceedings if the suit were litigated in Guatemala. After hearing expert testimony from each side, the state court accepted appellees' claim that, under Guatemalan law, the appellants would not be required to return. However, as a precautionary measure, the court said that it would reconsider its dismissal order if

[2] Subsequently, the court also denied appellants' motion to reconsider the order and its motion to certify the issue for interlocutory appeal.

the appellants were in fact required to return to Guatemala in connection with the trial. That decision was affirmed by an intermediate appellate court in Florida. Aldana v. Fresh Del Monte Produce Inc., 922 So. 2d 212 (Fla. Dist. Ct. App. 2006) (table).

In the meantime, a panel of this Court affirmed the district court's dismissal of all of the appellants' claims except the torture claims arising under the Alien Tort Act and the Torture Victim Protection Act. Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1253 (11th Cir. 2005) (per curiam), en banc reh'g denied, 452 F.3d 1284 (11th Cir. 2006), cert. denied, 127 S. Ct. 596 (2006). After the case was remanded to the district court, the appellees again moved to dismiss on forum non conveniens grounds. The matter was referred to a magistrate judge, who, after holding a hearing, issued a Report and Recommendation ("R&R") recommending that the motion be denied.

After reviewing the R&R, however, the district court rejected the magistrate judge's recommendations and granted appellees' motion to dismiss. Villeda Aldana v. Fresh Del Monte Produce, Inc., No. 01-3399-CIV, 2007 WL 3054986, at *1 (S.D. Fla. Oct. 16, 2007). In particular, the district court concluded that it was precluded under the doctrine of collateral estoppel, and by the Full Faith and Credit Act, 28 U.S.C. § 1783, from relitigating issues decided by the state court's forum non conveniens decision. Following the state court's findings where necessary, the district court thus found that each prong of the forum non

conveniens inquiry favored dismissal. As we discuss in greater detail below, the district court found that Guatemala afforded the appellants an adequate alternative forum for the resolution of their claims; and that all of the relevant private interest and public interest factors weighed heavily in favor of having the dispute adjudicated in Guatemala. Like the state court, however, the district court added that the dismissal was "without prejudice to Plaintiffs right to seek reconsideration if any of the Plaintiffs are required to appear in person in Guatemala in order to litigate their claims." Id. at *6.

This timely appeal followed.

II. Standards of Review

We review de novo whether the district court erred in failing to adhere to its initial order denying appellees' forum non conveniens motion as the law of the case. Transamerica Leasing, Inc. v. Inst. of London Underwriters, 430 F.3d 1326, 1331 (11th Cir. 2005) ("We review application of the law of the case doctrine de novo."); Alphamed, Inc. v. B. Braun Med., Inc., 367 F.3d 1280, 1285 (11th Cir. 2004). The question whether to give preclusive effect to a state court's judgment is a question of law, and thus also is reviewed de novo. See, e.g., Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001) ("Because deciding whether to apply issue preclusion (also referred to as collateral estoppel) is a question of law, we review de novo a district court's refusal to give a state court judgment preclusive effect.").

It is also well settled in our decisional law that "[w]e may only reverse a district court's dismissal based on forum non conveniens if it constitutes a clear abuse of discretion." Membreno v. Costa Crociere S.p.A., 425 F.3d 932, 935-36 (11th Cir. 2005). And it is well settled that abuse of discretion review is "extremely limited" and "highly deferential." In re Clerici, 481 F.3d 1324, 1331 (11th Cir. 2007) (United Kingdom v. United States, 238 F.3d 1312, 1319 (11th Cir. 2001)); see also Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) ("[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."). Thus, when we employ the abuse of discretion standard, "we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." United States v. Frazier, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). Notably, abuse of discretion review acknowledges that "there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment we will not reverse even if we would have gone the other way had the choice been ours to make." McMahan v. Toto, 256 F.3d 1120, 1128 (11th Cir. 2001).

III. Law of the Case

Appellants first argue as a threshold matter that the district court was prohibited by the law of the case doctrine from reconsidering its earlier order denying the appellees' first forum non

conveniens motion to dismiss. We find little merit in this claim.

Under the law of the case doctrine, "an issue decided at one stage of a case is binding at later stages of the same case." United States v. Escobar-Urrego, 110 F.3d 1556, 1560 (11th Cir. 1997). Notably, however, "a court's previous rulings may be reconsidered as long as the case remains within the jurisdiction of the district court." Vintilla v. United States, 931 F.2d 1444, 1447 (11th Cir. 1991) (quotation marks omitted). "Consequently, 'law of the case applies only where there has been a final judgment.'" Id. (quoting Gregg v. United States Indus., Inc., 715 F.2d 1522, 1530 (11th Cir. 1983)). Here, the district court's first forum non conveniens judgment was not final. Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988) ("We conclude, however, as have the majority of the Courts of Appeals that have considered the issue, that the question of the convenience of the forum is not completely separate from the merits of the action, and thus is not immediately appealable as of right.") (quotation marks and citations omitted); Ford v. Brown, 319 F.3d 1302, 1304 n.2 (11th Cir. 2003) (although forum non conveniens order was nonfinal, court of appeals had jurisdiction to review it pursuant to 28 U.S.C. § 1292(b)). Hence, the district court's initial decision did not constitute the law of the case.

Moreover, even if the district court's first forum non conveniens decision had constituted the law of the case, the district court still would have acted permissibly in departing from it. As we have

explained, the "law of the case doctrine does not . . . require rigid adherence to rulings made at an earlier stage of a case in all circumstances." Murphy v. F.D.I.C., 208 F.3d 959, 966 (11th Cir. 2000). In particular, we have carved out three principal exceptions to the law of the case doctrine: "when (1) a subsequent trial produces substantially different evidence (2) controlling authority has since made a contrary decision of law applicable to that issue or (3) the law-of-the-case is clearly erroneous and will work manifest injustice if not if not reconsidered." Culpepper v. Irwin Mortg. Corp., 491 F.3d 1260, 1271 (11th Cir. 2007) (quotation marks omitted).

The second of the exceptions is applicable here: the state court's forum non conveniens dismissal is a contrary decision of law applicable to the issue made by a controlling legal authority. Under the Full Faith and Credit Act, U.S.C. § 1738, the district court was bound in significant measure by the opinion of the state court, which was issued after the district court initially denied appellees' forum non conveniens motion to dismiss.

Hence, the district court's initial order denying the appellees' forum non conveniens motion to dismiss does not constitute the law of the case, and the district court was accordingly free to reconsider the issue and reach a different conclusion regarding the instant forum non conveniens motion.

IV. The District's Court's Forum Non Conveniens Analysis

It is by now clear that the forum non conveniens test used by Florida state courts is identical to the test applied by the federal courts. Indeed, the Florida Supreme Court has explicitly adopted the federal law of forum non conveniens. See Kinney Sys., Inc. v. Cont'l Ins. Co., 674 So.2d 86, 93 (Fla. 1996) ("[W]e are persuaded that the time has come for Florida to adopt the federal doctrine of forum non conveniens."); see also Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1283 n.2 (11th Cir. 1999) (noting that in Kinney, the Florida Supreme Court adopted the federal courts' forum non conveniens analysis as announced in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1946)). Under both bodies of law, a forum non conveniens dismissal is appropriate where:

> (1) the trial court finds that an adequate alternate forum exists which possesses jurisdiction over the whole case, including all of the parties;
>
> (2) the trial court finds that all relevant factors of private interest favor the alternate forum, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice;
>
> (3) if the balance of private interests is at or near equipoise, the court further finds that

> factors of public interest tip the balance in favor of trial in the alternate forum; and
>
> (4) the trial judge ensures that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.

Del Campo Bacardi v. De Lindzon, 845 So. 2d 33, 36 n.1 (Fla. 2002) (citing Fla. R. Civ. P. 1.061); see also Membreno, 425 F.3d at 937.

We believe the district court adequately performed each step of the forum non conveniens analysis, and did not abuse its discretion in concluding that the appellees met their burden to establish that a dismissal on forum non conveniens grounds was warranted.

A. Adequate Alternative Forum

The appellants first challenge the district court's conclusion that the initial "adequate alternative forum" prong of the forum non conveniens inquiry was fully met. The first prong of the forum non conveniens inquiry simply asks whether the alternative forum is "adequate" and "available." Membreno, 425 F.3d at 937. As we have observed, availability and adequacy are separate issues. Leon v. Million Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001). In order to be available, the foreign court must be able to "assert jurisdiction over the litigation sought to be transferred." Id. As for adequacy, we have observed that it is only in "rare circumstances" where "the remedy offered by the other forum is clearly

unsatisfactory," that the alternative forum may be regarded as inadequate. Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1283 (11th Cir. 2001) (quotation marks omitted). "The alternative forum prong of the analysis generally will be satisfied when the defendant is amenable to process in the other jurisdiction." Id. at 1282 (quotation marks omitted). Indeed, the Supreme Court has instructed us that a remedy is inadequate when it amounts to "no remedy at all." Id. at 1283 (quoting Piper Aircraft, 454 U.S. at 254).

The state court found that both of these requirements had been met. Specifically, the state court observed that "Guatemala possesses jurisdiction over the entire case, including all of the parties." State Court Order at 2. The state court also determined, based on consideration of expert testimony, that the appellants would not need to appear during the proceedings in Guatemala, and that, accordingly, litigating the case in Guatemala would pose no threat to the appellants' safety. Id. Finally, the state court rejected the appellants' claim that Guatemala was an inadequate forum because "lenient sentences" were given to certain of the individuals who were criminally prosecuted in connection with the underlying events giving rise to the case. Id. The district court, concluding that it was bound by these judgments, likewise determined that Guatemala qualified as an adequate alternative forum. Villeda Aldana v. Fresh Del Monte Produce, Inc., No. 01-3399-CIV, 2007 WL 3054986, at *3 (S.D. Fla. Oct. 16, 2007).

The appellants argue, nevertheless, that the district court abused its discretion by relying on the state court's determination that Guatemala was an adequate alternative forum, instead of conducting its own inquiry into the issue. The appellants contend that Guatemala is not an adequate forum for two reasons: first, because it is not safe for them; and second, because Guatemalan courts are beset by corruption and are ill-equipped to adjudicate a case, like this one, that implicates political conditions and officials. We are unpersuaded.

We do not take lightly the appellants' first contention -- that Guatemala is not safe for them. Nevertheless, even if the district court were not bound by the state court's opinion on this point, the argument still fails, because it is premised on the concern that the appellants might be required to return to Guatemala. As we have already noted, both the state court's and the district court's forum non conveniens dismissals contained an express proviso that the appellants' motions would be reconsidered if there is ever any indication that they might be required to return to Guatemala.

In addition to citing the possibility of danger, the appellants also argue that Guatemala is an inadequate forum because of alleged corruption affecting the nation's legal system. Specifically, they contend:

> Plaintiffs presented the District Court with substantial evidence that Guatemala is ill-equipped to adjudicate a case challenging the

> use of clandestine security forces to torture trade unionists in a country where trade unionists are routinely murdered, and judges turn a blind eye to such violence. While mere corruption in a foreign judicial system may be insufficient to render a forum insufficient, if the level of impunity renders the remedy offered by the alternative forum "so clearly inadequate or unsatisfactory that it is no remedy at all," the forum cannot be considered an adequate, alternative forum.

Appellants' Br. At 31-32.

Again, this argument fails because the state court specifically found that Guatemala's courts were adequate. Under the doctrine of collateral estoppel, a court is precluded from relitigating an issue "when the identical issue has been litigated between the same parties and the particular matter was fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction." Paresky v. Miami-Dade County Bd. of County Comm'rs, 893 So.2d 664, 665-66 (Fla. Dist. Ct. App. 2005). In this case, the district court was thus bound by the state court's factual and legal conclusions on the issue of adequacy of forum. Since it was bound by the state court's conclusion, the district court did not err in failing to find that Guatemala's courts were inadequate due to corruption.[3]

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[3] The appellants also suggest that the district court abused its discretion by failing to consider "new and recent evidence" of violence against union leaders like the appellants. Specifically, they point to the alleged murder of

Marco Ramirez, who, like the appellants, was a member of SITRABI. As evidence of the murder, the appellants state that they

> submitted to the District Court a copy of a press release from The Center for Labor Solidarity in Guatemala, which stated that: "Ramirez's murder is the most recent in a series of threats and attacks against SITRABI and its leaders". . . . The assassination of Ramirez came just three days after SITRABI learned that military officers had been disciplined by the Ministry of Defense in response to SITRABI complaints about the unlawful entry.

Appellants' Br. at 27 (citation omitted). The press release was from the group's Internet website.

The parties dispute whether the press release was admissible evidence. Appellees contend that the document is hearsay. The appellants first argue, however, that the press release falls within the business records exception to the hearsay rule. See Fed. R. Evid. 803(6). In particular, they say that the press release should be viewed as a business record because "it was issued by the Solidarity Center in the ordinary course of its business as a well-respected, nongovernmental organization that frequently issues such releases." Appellants' Reply Br. at 12. However, the appellants cite no case, and we have been unable to find any, in which a press release from an Internet website qualified as a business record within the meaning of the exception.

The appellants also claim that appellees never moved to strike the document. Appellees do not appear to dispute this contention, but it does not help the appellants for at least two reasons. First, whether or not appellees objected to the document, the press release lacks the indicia of reliability that are typically required of evidence admitted under an exception to the hearsay rule. Consequently, even if the document in some sense was part of the record, it is not clear why the district court would have abused its considerable discretion in declining to consider it. And, in any event, as

In short, the district court did not abuse its discretion in determining that Guatemala represented an adequate alternative forum.

B. Private Interest Factors

Appellants next challenge the district court's consideration of private interest factors and its conclusion that the private interests weighed heavily in favor of dismissal on forum non conveniens grounds. In particular, the appellants argue that the district court erred in considering only those factors considered by the state court and in giving insufficient weight to the appellants' choice of forum. We disagree.

In Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), the Supreme Court outlined the relevant public and private interest factors. In considering the private interests, the Court listed these:

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other

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with the appellants' other attempts to challenge the adequacy of Guatemala as an alternative forum, any concern over the appellants' safety is effectively addressed by the fact that the appellants will not be required to return to Guatemala.

> practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Id. at 508. We have continued to recite the same list of private interests ever since Gilbert. See, e.g., Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339, 1356 (11th Cir. 2008) ("Pertinent private interests of the litigants include relative ease of access to evidence in the competing fora, availability of witnesses and compulsory process over them, the cost of obtaining evidence, and the enforceability of a judgment."); Membreno, 425 F.3d at 937 (quoting Gilbert); SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097, 1101 (11th Cir. 2004).

Following the state court, the district court addressed each of the Gilbert factors. Specifically, the district court considered the ease of access to sources of proof, noting that the alleged misconduct occurred in Guatemala, and that the vast majority of documentary evidence was located in Guatemala; the district court discussed the cost of obtaining the attendance of witnesses, observing that all of the witnesses except for the appellants were located in Guatemala, and that significant expense would be incurred in transporting them to the United States; the district court examined its ability to compel the attendance of unwilling witnesses, explaining that all of the witnesses except for

the appellants lived in Guatemala, and therefore could not be compelled to attend the proceedings; and the district court took account of additional practical and logistical difficulties--for example, the need to translate document in Spanish, and the linguistic barriers resulting from the fact that few of the witnesses were able to speak English. Aldana, 2007 WL 3054986, at *4.[4]

The district court also considered the plaintiffs' choice of forum. In doing so, the district court correctly noted that its analysis of this factor was not dictated by the state court's analysis, because the relevant forum for purposes of the state forum non conveniens

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[4] The dissent argues that the district court abused its discretion in part by misstating certain of the state court's factual findings. In particular, the dissent observes that while the state court found that the "vast majority" of the evidence and witnesses were located in Guatemala, the district court stated that "the entirety of the witnesses except for the plaintiffs are located in Guatemala" and "the only evidence that is in the United States is the testimony of the Plaintiffs." Aldana, 2007 WL 3054986, at *4. We do not regard this as a serious difficulty. To the extent that the two characterizations diverge, we find the differences to be insignificant. Even assuming that there were some witnesses in the United States in addition to the appellants, it would nevertheless remain true that the vast majority of the witnesses were located in Guatemala. Similarly, even if there were some evidence in the United States beyond the appellants' testimony, it would nonetheless remain true that the vast majority of the evidence was to be found in Guatemala. As a result, both considerations – the location of the evidence and the witnesses – would still point decisively in favor of litigating in Guatemala.

analysis is the state of Florida, whereas the relevant forum for purposes of the federal analysis is the United States as a whole. Id. On this factor, the district court recognized that the appellants were not residents of the chosen forum for purposes of the state analysis (none of them resided in Florida), but were residents of the chosen forum for purposes of the federal analysis (since all of them resided in the United States). The trial court observed that plaintiffs' choice of forum is entitled to substantial deference where the plaintiffs are residents of the chosen forum, and thus the district court determined that, in contrast to the state court's inquiry, the appellants' choice of forum was a significant factor weighing in the their favor. Despite the strong presumption in favor of the appellants' chosen forum, however, the district court reasoned that this single factor was outweighed by all of the countervailing private interests that favored a Guatemalan forum. Indeed, the district court concluded that the private interest factors so overwhelmingly favored Guatemala that it was unnecessary to consider the public interest factors at all. Id. at *5.

We find no clear abuse of discretion in the district court's forum non conveniens analysis. The district court correctly observed that it was bound by the state court's analysis of each of the individual private interest factors, but not by the state court's analysis of the plaintiff's choice of forum. Moreover, the district court clearly recognized that, since the appellants lived in

their chosen forum for the purposes of the federal analysis, this factor weighed heavily in their favor. The district court squarely took account of our requirement that there be "positive evidence of unusually extreme circumstances," and that the court be "thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country." Aldana, 2007 WL 3054986, at *3 (citing SME Racks, 382 F.3d at 1101-02).

At the same time, the district court also correctly pointed out that the plaintiffs' forum choice alone is not dispositive. Rather, as the Supreme Court has explained, its forum non conveniens cases "have repeatedly emphasized the need to retain flexibility" and have underscored that "each case turns on its facts." Piper Aircraft Co., 454 U.S. at 249 (quotation marks omitted). The Court has further explained that if "central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable." Id. at 249-50. Thus, while the plaintiffs' choice of forum has traditionally been regarded as particularly important, it is ultimately only a proxy for determining the convenience of litigating in one forum instead of another, and that, at bottom, "the central focus of the forum non conveniens inquiry is convenience." Id.

Here, the district court found that the plaintiffs' choice of forum was the only private interest factor weighing in the appellants' favor, whereas each of the other private interest factors -- i.e., the relative ease of access to sources of proof, which in this case were located predominately in Guatemala; the cost of obtaining attendance of willing witnesses, who in this case were also almost entirely in Guatemala; the ability to compel the unwilling witnesses, which in this case was lacking for the witnesses who lived in Guatemala; and additional practical and logistical issues, which in this case included the need to translate documents, and other linguistic barriers -- favored a forum non conveniens dismissal. The trial court concluded that the lineup of private interest factors found in this case constituted "'positive evidence of unusually extreme circumstances,'" Aldana, 2007 WL 3054986, at *5 (quoting SME Racks, 382 F.3d at 1102), sufficient to override the real presumption in favor of the plaintiffs' forum choice, and that on the whole, the balance of private interest factors strongly favored Guatemala as the forum for this case. It was only after precise and careful analysis that the district court came to this conclusion. We thus see no basis for the appellants' claim that the district court "disregarded completely Plaintiffs' choice of forum," Appellants' Br. at 34, nor any ground for concluding that this aspect of the court's analysis amounted to a clear abuse of discretion.

The dissent argues that the district court abused its discretion in concluding that it was collaterally estopped from considering private interests beyond those considered by the state court, and, therefore, by failing to consider additional private interests -- specifically, the appellants' interest in appearing in person at trial, and the prejudice appellants were likely to suffer as a result of the delay in having to begin litigation anew in Guatemala. We disagree.[5]

As an initial matter, we do not share the dissent's assumption that the district court indeed regarded itself as precluded by the doctrine of collateral estoppel from considering private interests beyond those considered by the state court. In its order, the court merely says that "[b]ecause the private interest factors involved in forum non conveniens cases are identical in Florida and federal law, this Court is precluded from considering a different list of private interests." Aldana, 2007 WL 3054986, at *4. Nowhere in its discussion of this issue does the district court mention the principle of collateral estoppel or make any mention of the state court's opinion. In our view, the district court could just as well be understood as saying something quite different – for example, that since the federal and state forum non conveniens doctrines are the same, the district

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[5] And, to the extent the dissent references, in passing, a third conceivable interest -- the relative ease of enforcing a judgment -- as best we can tell, this interest was not argued at the district court level, and was not raised at all by the appellants in their blue brief.

court was required to apply the factors listed in Gilbert, despite the fact that the state court followed Florida law. To be sure, the meaning of the district court's order on this point is not self-evident. But we see no reason to accept the dissent's interpretation, particularly when that interpretation gives rise to complexities that alternative interpretations do not.

In any event, regardless of whether the district court was bound (or thought it was bound) by collateral estoppel to consider only those factors addressed by the state court, we cannot agree that the district court abused its discretion in failing to consider these additional factors. For one thing, as we have noted, the district court's analysis took account of each of the paradigmatic private interest factors enumerated in our case law. Again, since the Supreme Court's decision in Gilbert, we have continued to enumerate the private interest factors as including "[the] relative ease of access to evidence in the competing fora, availability of witnesses and compulsory process over them, the cost of obtaining evidence, and the enforceability of a judgment." Renta, 530 F.3d at 1356. Where, as here, the district court has adequately considered each of these factors, we are loath to find a clear abuse of discretion.

We further point out that, under these circumstances, obliging a district court to consider factors not considered by a state court would give rise to a number of substantial difficulties. For example, given the potentially

limitless number of private interests, it is virtually always possible for a reviewing court to identify additional interests that a district court might have considered. District court forum non conveniens rulings would possess very little finality if they could be overturned on appeal by second-guessing the district court's decision to limit itself to a particular set of interests, especially where those interests mirror precisely the factors that the Supreme Court has explicitly enumerated.

In a similar way, in virtually any case, a district court could very likely identify any number of private interests beyond those considered in an otherwise preclusive state court forum non conveniens determination. Once a district court begins to examine private interests beyond those considered by a state court -- particularly where the state court has considered each of the factors listed by the Supreme Court in Gilbert -- there would appear to be no easy way of cabining the number of such interests the district court might take into account. By invoking a sufficient number of additional interests, a district court might easily end up conducting an inquiry entirely different from the one performed by the state court and arriving at a balance contrary to the one reached by the state court. In essence, this would allow a federal court regularly to nullify or circumvent an otherwise preclusive state court forum non conveniens judgment.

Finally, and most importantly, we are not convinced that consideration of the additional factors suggested by the dissent would indeed alter the balance of private interest factors in any meaningful way. For one thing, appellants' claimed interest in being present at trial and in testifying in person does not seem to weigh very heavily in the appellants' favor here, because the interest in being present and testifying at trial is shared by both appellants and appellees. While the appellants are not likely to testify in person if the case is tried in Guatemala (due to safety concerns), many defense witnesses would not testify in person if the case were tried in the United States (because they are not subject to the court's compulsory process). In other words, the interest in being present at trial in this case may be a wash.

Nor are we convinced that the overall balance of private interests would be significantly affected by the second private interest cited by the dissent -- that of avoiding the prejudice caused by the delay of having litigation over again if the case were dismissed.[6]

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[6] As an initial matter, the appellants' have likely waived the issue by not properly raising it below. The appellants have raised the issue of delay before the magistrate judge -- but only during oral argument and only in the most glancing terms. Notably, in responding to the appellees' waiver argument, the appellants cite to a mere twenty lines from the transcript of the hearing before the magistrate judge. See, e.g., Stewart v. Dep't of Health and Human Servs., 26 F.3d 115, 115 (11th Cir. 1994) ("As a general principle, this court will not address an argument that has not been raised in the district

At the outset, it is unclear that avoiding delay ought to be considered a "private interest" at all, as opposed to a consideration relevant to the "adequate alternative forum" step of the forum non conveniens inquiry.[7] Indeed, in many cases,

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court."); cf. Alfadda v. Fenn, 159 F.3d 41, 48 (2d Cir. 1998) (plaintiffs failed to argue with sufficient particularity that the amount of discovery conducted to date weighed against forum non conveniens dismissal and therefore waived the issue).

[7] For example, some courts have taken account of the delay that can be expected once a plaintiff's suit is instituted in an alternative forum in assessing the adequacy of the foreign forum. See, e.g., Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1227 (3d Cir. 1995) (treating delay due to litigation backlog as a factor relevant to whether an alternative forum was adequate); In re Bridgestone/Firestone, Inc., 190 F. Supp. 2d 1125, 1153 (S.D. Ind. 2002) ("[D]elay in the foreign court usually is considered to the extent that it may render the alternative forum inadequate."); Broad. Rights Intern. Corp. v. Societe du Tour de France, S.A.R.L., 708 F. Supp. 83, 85 (S.D.N.Y. 1989) (treating delays in an alternative forum's judicial system under the adequacy prong).

Similarly, courts have considered the amount of discovery already completed in the litigation, and the delay resulting from having to begin again, in assessing an alternative forum's adequacy. See, e.g., Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G., 955 F.2d 368, 372-73 (5th Cir. 1992). And several have noted confusion over just how the issues of delay and prejudice fit into the overall forum non conveniens inquiry. Alfadda, 159 F.3d at 48 ("There appears to be some disagreement, largely of academic interest, as to whether the extent of completed discovery should be considered a public or a private interest under the Gilbert analysis."); see also Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 613 (3d Cir. 1991).

federal courts have considered the issue of delay as falling under the latter rubric.[8] Even if the issue of delay should be taken into account -- and taken into account as a private interest -- there is still little reason to think that the balance of the private interests would be meaningfully altered as a result. The appellants point out that the case has been pending for some six years. But, "there is generally no time limit on when a motion to dismiss for forum non conveniens must be made, which differentiates it from the time limits on a motion to dismiss for

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[8] The issue is relevant here because, if the interest in avoiding delay is properly analyzed in connection with the "adequate alternative forum" prong of the forum non conveniens inquiry, the district court would not have erred in failing to consider it along with the private interest factors. Nor, however, would the district court have committed a clear abuse of discretion in failing to consider the delay factor in connection with the adequate alternative forum inquiry. As we have noted, it is only in "rare circumstances" where "the remedy offered by the other forum is clearly unsatisfactory," that the alternative forum may be regarded as inadequate. Satz, 244 F.3d at 1283. "The alternative forum prong of the analysis generally will be satisfied when the defendant is amenable to process in the other jurisdiction." Id. at 1282 (quotation marks omitted). Again, the Supreme Court has noted that a remedy is inadequate when it amounts to "no remedy at all." Id. (quoting Piper Aircraft, 454 U.S. at 254). Here, even assuming that the appellants would suffer some prejudice by having to begin the litigation anew in Guatemala, the prejudice would not amount to leaving the appellants with no remedy at all. Since Guatemala would qualify as an adequate alternative forum in any event, the district court's failure explicitly to consider the appellants' interest in averting delay would hardly have affected the outcome.

improper venue." Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, 14D Fed. Prac. & Proc. Juris. 3d § 3828 (3d ed. 2008). And indeed, courts have upheld the forum non conveniens dismissal of cases pending for as long as, if not longer than, the instant case. See, e.g., Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G., 955 F.2d 368, 373 (5th Cir. 1992) (case's stage of development did not weigh against dismissal even though underlying suit was filed eight years before and even though "much work ha[d] been done on th[e] case").

The appellants also claim that the district court's dismissal was an abuse of discretion given the amount of discovery conducted so far in the case. In point of fact, however, discovery in this case has been relatively limited, focused largely on jurisdictional questions rather than on the merits. According to the appellants, when the district court granted the forum non conveniens motion, the parties "had exchanged written discovery responses and documents, and were in the midst of supplementing such responses and preparing for depositions." Appellants' Reply Br. at 23. This Court, and others, have upheld forum non conveniens dismissals in cases where more discovery had been conducted. In Sigalas v. Lido Mar., Inc., 776 F.2d 1512 (11th Cir. 1985), for example, we upheld the district court's forum non conveniens dismissal at the pretrial conference stage, "after lengthy discovery when [the case] was ready to be tried on the merits." Id. at 1520; see also

Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 614 (3d Cir. 1991) ("[W]e hold today that whenever discovery in a case has proceeded substantially so that the parties already have invested much of the time and resources they will expend before trial, the presumption against dismissal on the grounds of forum non conveniens greatly increases."); Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1335 (9th Cir. 1984) ("That trial preparation had progressed nearly to the point of trial certainly was a relevant factor when the district court considered whether trial of the case in Arizona would have been more easy, expeditious and inexpensive than trial in the Philippines.") (quotation marks omitted, emphasis added); cf. Mercier v. Sheraton Int'l, Inc. 981 F.2d 1345, 1357 (1st Cir. 1992) (merits activity "never approached the level which was held to preclude dismissal in Lony or to weigh against dismissal Gates").[9]

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[9] The appellants cite only two cases in support of their suggestion that it would be an abuse of discretion to grant a motion to dismiss at this stage on forum non conveniens grounds. The first is La Seguridad v. Transytur Line, 707 F.2d 1304, 1310 (11th Cir. 1983). By the appellants' own reckoning, however, that case stands only for the proposition that a "court must consider the prejudice and inconvenience to the plaintiff in having his or her case relegated to a foreign forum." Appellants' Br. at 41 (emphasis added). The question here is not whether the court considered the inconvenience to the appellants of having the case moved to Guatemala; it is whether the court should have considered the inconvenience resulting from the transfer after six years of litigation in American courts. Hence, La Seguridad is inapposite.

In short, none of the concerns raised by the dissent persuades us that the district court was obliged to consider private interest factors beyond the ones that it covered in its analysis. Again, this is not to say that the district court's conclusion was the only reasonable one, or that another court could not reasonably have come to a different conclusion, or even that if we were writing on a clean slate we wouldn't have reached the opposite conclusion. We say, however, only that the district court could reasonably find that, with the exception of the plaintiffs' choice of forum, all of the private interest factors weighed in favor of dismissal, and that, even while assigning substantial weight to the plaintiffs' choice of forum, the

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The appellants' second case is Genpharm Inc. v. Pliva-Lachema, 361 F. Supp. 2d 49 (E.D.N.Y. 2005), which has no precedential value for this Court, and, in any event, is also wide of the mark. Genpharm merely observed that the court could take account of "the fact that the Defendants have moved for dismissal based on forum non conveniens more than a year after the case was filed." Id. at 60. The decision does not suggest that such a delay, standing alone, would be enough to warrant denying the defendants' forum non conveniens motion. Moreover, the facts in this case are very different from those in Genpharm: here, the appellants do not contend that appellees' first forum non conveniens motion was tardy. The fact that appellees renewed their motion at a later stage in the case's development was because it was not until that time that the state court issued its forum non conveniens dismissal. If the state court had granted the motion earlier, appellees would in all likelihood have renewed its motion earlier. In any event, given the state court's decision, it was perfectly reasonable for appellees to renew their forum non conveniens motion in the federal action.

overall balance tilted decidedly on the side of Guatemala.

C. Public Interest Factors

Next, the appellants claim that the district court erred in its balancing of the public interest factors by failing to assign sufficient weight to the United States' interest in adjudicating claims under the ATA and the TVPA. As we have indicated, however, it is only when the private interest factors are "at or near equipoise" that a district court is obliged to consider the public interests at stake in a suit. Del Campo Bacardi, 845 So. 2d at 36 n.1; see also Membreno, 425 F.3d at 937. Thus, since the district court here did not err in concluding that the private interest factors overwhelmingly favored dismissal, it was not necessary, as the district court itself observed, to analyze the public interest factors.

Nevertheless, the district court did address the public interest factors, and for completeness, we note that, even if addressing the factors had been necessary (and on this record, we do not think so), the district court's analysis of these factors did not amount to a clear abuse of discretion.

In examining the public interest factors, the district court first observed that it was not bound by the state court's discussion of the public interest factors because that part of the opinion was not essential to the state court's

ultimate ruling. However, the district court approvingly cited the state court's discussion of the public interest factors. In particular, like the state court, the district court found that the dispute was "quintessentially Guatemalan," since it involved "one of Guatemala's largest private employers in one of Guatemala's most important economic sectors" and "one of Guatemala's most influential labor unions." Aldana, 2007 WL 3054986, at *5. In addition, the court observed that the appellants' "choice of a Florida forum imposes an inappropriately heavy burden on this Court and this community," while "Guatemala, on the other hand, has a paramount interest in this dispute and its courts are more appropriate for adjudicating Plaintiffs' claims." Id.

Furthermore, the district court concluded that while "there is a strong public interest in favoring the receptivity of United States courts to [torture] claims under 28 U.S.C § 1350, there is a greater policy interest in preventing forum shopping, as well as in protecting comity between the United States and other nations and other such interests." Id. Thus, the district court held that, like the private interests, the public interests also weighed heavily in favor of dismissal, and that, as a result, even if the private interest factors had not decisively favored Guatemala, dismissal of the suit on forum non conveniens grounds still would have been appropriate. Id.

Far from disregarding the importance of adjudicating claims under the ATA and TVPA, the district court explicitly acknowledged the "strong public interest in favoring the receptivity of United States courts to [such] claims." Id. The district court concluded, however, that "there is a greater policy interest in preventing forum shopping, as well as in protecting comity between the United States and other nations and other such interests." Id. The district court's concern here is not unreasonable: it is not hard to imagine that Guatemala might regard trying this case in an American court as a tacit acceptance of the appellants' assertion that the Guatemalan judicial system is too corrupt to justly resolve the dispute.

Indeed, the appellants essentially make just this argument. They fault the district court for ignoring evidence that "Guatemala has little interest in bringing Plaintiffs' violators to justice or prosecuting trade union violence cases," and they point out that "the U.S. State Department has for years reported the notorious level of violence against Guatemalan trade unionists, and the level of impunity which prevents the Courts from bringing the perpetrators of trade union violence to justice." Appellants' Br. at 40. But this suggestion is at war with the undisputed finding that Guatemalan courts constitute an adequate alternative forum. State Ct. Op. at 2; Aldana, 2007 WL 3054986, at *3. The district court could

reasonably have decided to avoid the risk of conveying any such suggestion.

The district court identified key public interests such as maintaining comity with other nations, and the foreign sovereign's undeniable interest in adjudicating this dispute, involving one of Guatemala's largest private employers in a very important economic sector, and one of the sovereign's most influential labor unions. Moreover, the district court weighed these various factors in a reasonable fashion and determined that Guatemala's interest was stronger than the United States'. Under an abuse of discretion standard, "the district court had a range of choice and . . . we cannot reverse just because we might have come to a different conclusion had it been our call to make." Sloss Indus. Corp. v. Eurisol, 488 F.3d 922, 934 (11th Cir. 2007) (quotation marks omitted).[10] Since

[10] In arguing that the United States has a superior interest in adjudicating the dispute, the appellants cite Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000). There, the Second Circuit indicated that the TVPA "in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy favoring receptivity by our courts to such suits." Id. at 105. Wiwa also states the TVPA "expresses a policy favoring our courts' exercise of the jurisdiction conferred by the ATCA in cases of torture unless the defendant has fully met the burden of showing that the . . . factors tilt strongly in favor of trial in the foreign forum." Id. at 100 (quotation marks and brackets omitted). But, at the same time, the court itself rejected the view that "the TVPA has nullified, or even significantly diminished, the doctrine of forum non conveniens," and explained that the statute simply

the underlying events took place in Guatemala, all of the individuals involved were (at least at the time) Guatemalan citizens, and Guatemalan political and economic tensions form the essential backdrop to the entire dispute, we are hard-pressed to say that the district court abused its discretion in reaching this conclusion, even if it had been required to address the public interest factors at all.

In short, we discern no abuse of discretion in any aspect of the district court's forum non conveniens analysis, and, accordingly, affirm.

AFFIRMED.

"communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business." Id. at 106.

KRAVITCH, Circuit Judge, dissenting:

I believe the district court erred in finding that the state court's consideration of the private interest factors had a preclusive effect in this case. Furthermore, I believe the district court abused its considerable discretion in its weighing of the private and public interest factors at issue in this case. For these reasons, I would vacate the district court's order and remand this matter for reconsideration. Accordingly, I respectfully dissent.

A. Collateral Estoppel

"[A] federal court must give the same full faith and credit to the records and judicial proceedings of any state court that they would receive in the state from which they arise." Gjellum v. City of Birmingham, 829 F.2d 1056, 1060 (11th Cir. 1987) (citing 28 U.S.C. § 1738). This is the rule regardless of whether the state court's judgments are erroneous. Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 373 (1996); Lops v. Lops, 140 F.3d 927, 938 (11th Cir. 1998). The preclusive effect of state judgments in federal court is determined, in the first instance, according to principles of state law. See Marrese v. Am. Acad. Of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985) ("This statute [28 U.S.C. § 1738] directs a federal court to refer to the preclusion law of the State in which judgment was rendered.") In Florida, "collateral estoppel applies when the identical parties wish to relitigate issues that were

actually litigated as necessary and material issues in a prior action." Carson v. Gibson, 638 So. 2d 79, 81 (Fla. Dist. Ct. App. 1994) (citing Albrecht v. State, 444 So. 2d 8 (Fla. 1984)).

In this case, the district court did not adopt the state court's decision *in toto*, but found that only certain of the state court's findings gave rise to collateral estoppel. The court correctly recognized that the *forum non conveniens* analysis differs between state and federal courts, see Esfeld v. Costa Crociere, 289 F.3d 1300,1303 (11th Cir. 2002) (deciding that federal and Florida *forum non conveniens* analyses are not identical for *Erie* purposes), and only adopted those factual findings of the state court which it deemed to be identical to the factual inquiries required of it. See Cook v. State, 921 So. 2d 631, 634 (Fla. Dist. Ct. App. 2005) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is inconclusive in a subsequent action between the parties, whether on the same or a different claim.") (quoting Restatement (Second) of Judgments § 27 (1982)). Specifically, the district court found that it was bound (1) by the state court's determination that Guatemala provides an adequate and available alternative forum for Plaintiffs to bring suit and (2) by the state court's finding that the only relevant private interest factors implicated in the case are that the alleged misconduct occurred in Guatemala, the vast majority of witnesses and evidence is

located in Guatemala, and the vast majority of documentary evidence and potential live testimony would require translation from Spanish for admission in Florida state court. This court must consider de novo whether the district court erred in finding that it was bound by the state court's resolution of these issues.

I agree with the majority that federal and Florida state law require an identical analysis for determining the availability and adequacy of a foreign forum. Thus, because in deciding the issue the district court would have been required to consider and decide questions of fact already decided by the state court, I agree that the district court did not err in finding that it was bound by the state court's conclusion that Guatemala is an adequate alternative forum.

I disagree, however, with the majority's conclusion that the district court "was bound by the state court's analysis of each of the individual private interest factors." The district court found that "the private interest factors involved in *forum non conveniens* cases are identical in Florida and federal law" and concluded that it was therefore "precluded from considering a different list of private interests." Aldana v. Fresh Del Monte Produce, Inc., 2007 WL 3054986, * 4 (S.D. Fla. Oct. 16, 2007). This court has held, however, that the private interests involved in trying a case in state or federal court are not identical. See Esfeld, 289 F.3d at 1303 (noting that in the *forum non conveniens* context, federal courts, unlike state

courts, do not focus on the connection between the case and a particular state, but rather on the connection of the case to the United States as a whole). The district court itself recognized this fact. Immediately after finding that the private interest factors involved were identical, the district court noted that "the only different private interest is that in Florida state court, the Plaintiffs were not residents of Florida and thus were not afforded a special presumption of correctness [whereas] in this Court as residents of the United States they are afforded such a presumption." Aldana, 2007 WL 3054986 at * 4 (emphasis in original). "The well established rule in Florida has been and continues to be that collateral estoppel may be asserted only when the identical issue has been litigated between the same parties . . . ." R.D.J. Enterprises, Inc. v. Mega Bank, 600 So. 2d 1229, 1231 (Fla. Dist. Ct. App. 1992) (emphasis added). Where the inquiries are anything less than identical, collateral estoppel does not apply. See id. Accordingly, because the pragmatic concerns a party faces by being called into a federal court are not identical to the concerns implicated by being called into state court, the district court was not required to adopt the state court's conclusion that "[t]he private interest factors weigh heavily in favor of the Guatemalan forum." Aldana v. Fresh Del Monte Produce, Inc., No. 04-00723-CA-20, slip op. at 4 (Fla. Cir. Ct. March 30, 2005). Furthermore, collateral estoppel did not prevent the district court from considering "a different list" of private interests not explicitly considered

by the state court. Rather, the district court was free to consider, without limitation, any number of pragmatic concerns which would make trial of this case in either forum "easy, expeditious and inexpensive" and to give whatever weight to these concerns that it deemed appropriate. Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947).

To the extent the state court made specific factual findings regarding certain private interest factors which were also relevant to the district court's inquiry, however, the district properly did not revisit these factual determinations. Specifically, the district court was bound by the state court's limited factual findings that "the alleged misconduct of which the Plaintiffs complain occurred in Guatemala, the vast majority of the witnesses and documentary evidence [is] located in Guatemala or in countries close to Guatemala, the vast majority of the documentary evidence is in Spanish . . . , and the witnesses either do not speak English or Spanish is their native language."[1] Aldana, No. 04-00723-CA-20, slip op. at 4. These factual issues were fully litigated and resolved by the state court and these facts are relevant to both the state and the federal court's *forum non conveniens* analysis. Issue preclusion, therefore, required the district court to adopt the state court's resolution of these

[1] This sentence represents the entirety of the state court's factual findings regarding the parties' private interests in this case. As discussed infra, however, the district court described these findings differently in its order.

specific questions of fact. The weighing of these facts, however, remained within the exclusive power of the district court, as did the consideration of any additional private interests upon which the state court did not make explicit findings. For example, the state court did not address the Plaintiffs' strong interest in being present at their trial.[2] Also, the state court made no factual findings regarding any prejudice to Plaintiffs resulting from the dismissal of their lawsuit at this late date, In re TS Tech USA Corp., 551 F.3d 1315, 1320 (Fed. Cir. 2008) (noting that the possibility of delay and prejudice is a private interest factor in the *forum non conveniens* analysis), or regarding the relative ease of enforcing a judgment in

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[2] Plaintiffs' interest in being present for trial is a private interest weighing in favor of Plaintiffs' choice of forum which should be considered separate and apart from the issue of whether Guatemala provides an adequate forum. See Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1150 (C.D. Cal. 2005) (holding that because "Plaintiffs would be able to file their case in Colombia, . . . Plaintiffs' concerns as to their safety are more appropriately considered in the private interest factors analysis."); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1208 (C.D. Cal. 2002) (stating that "plaintiffs' fears, while an appropriate consideration in assessing whether private interest factors favor a *forum non conveniens* dismissal, do not render [Papua New Guinea] an inadequate forum"); see also In re Bridgestone/Firestone, Inc., 190 F. Supp. 2d 1125, 1144 (S.D. Ind. 2002) (considering the "political instability and violence in Colombia" in its private interest factors analysis).

either forum.[3] See Ford v. Brown, 319 F.3d 1302, 1307 (11th Cir. 2003) ("There may also be questions as to the enforceability of a judgment if one is obtained."). In addition to this non-exhaustive list, the district court was free to consider any number of other practical problems that make trial of a case in a particular forum an undue burden upon either party.[4] Id. Accordingly, I conclude that the district court erred in its application of collateral estoppel and that this error caused it to believe it could not

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[3] Relevant to this determination is the fact that the main corporate defendant, Del Monte, is incorporated and located in the United States.

[4] The majority asserts that because the district court, in limiting its analysis to those factors considered by the state court, still addressed the majority of the Gilbert factors, it performed a proper analysis of the private interests. The majority argues that the dissent "second-guess[es] the district court's decision to limit itself to a particular set of interests." This, however, is not my intent. If the district court, after properly interpreting the law of collateral estoppel, had actually decided to limit its analysis to the list of private interest factors set forth by the state court, I would agree with the majority that its analysis is entitled to substantial deference. Here, however, the district court did not decide to only consider the private interests cited by the state court; rather, it misapplied the law of collateral estoppel and this error caused it to conclude that it could only consider these interests. This error of law influenced the district court's balancing of the relevant factors and constitutes and abuse of discretion. See Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 405 (1990) (noting that a district court by definition abuses its discretion when it makes an error of law).

consider and weigh private interests which were properly before it.

B. Forum Non Coaveniens: Weighing of the Factors

As described more fully below, in addition to erroneously concluding that its analysis must be limited to those private interest factors addressed by the state court, I believe the district court also misinterpreted the facts actually found by the state court. These errors caused the district court to strike a balance of the parties' private interests that was an abuse of discretion. I also believe the district court committed errors constituting an abuse of discretion in weighing the relevant public interest factors. I conclude, therefore, that the district court's balancing of the parties' relevant public and private interests is invalid. See Ford, 319 F.3d at 1308 (holding that the district court "overlooked some highly relevant factors, and that it ultimately struck a balance that was an abuse of discretion").

1. Private Interest Factors

With regard to the weighing of the private interests, the Supreme Court has held that the plaintiffs' choice of forum should rarely be disturbed "unless the balance is strongly in favor of the defendant." Gilbert, 330 U.S. at 508. This presumption in favor of the plaintiffs' initial forum choice is at its strongest when the plaintiffs are citizens, residents, or corporations

of this country. Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001) ("[B]alancing private interests requires determining the convenience of the parties, affording domestic plaintiffs 'a strong presumption' that their forum choice is sufficiently convenient, and a weaker presumption applying in cases brought by foreign plaintiffs."). Although the Supreme Court has been clear that "dismissal should not be automatically barred when a [domestic] plaintiff has filed suit in his home forum," Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.23 (1981), in this circuit, we have long mandated that district courts "require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country." SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097, 1101 (11th Cir. 2004) (quoting La Seguridad v. Transytur Line, 707 F.2d 1304, 1308 n.7 (11th Cir. 1983)).

Here, the district court noted that because Plaintiffs are lawful residents of the United States, it must give Plaintiffs' choice of forum "a special presumption of correctness;" however, the court then dismissed the presumption as "not singularly dispositive" after finding that it was bound by the state court's finding that "[t]he only evidence that is in the United States is the testimony of the Plaintiffs." Aldana, 2007 WL 3054986 at *4. This analysis is flawed for two reasons. First, the district

court's finding that Plaintiffs' location in the United States is the sole factor weighing in favor of Plaintiffs' choice of forum is a misstatement of the state court's factual findings. Although the district court purported to adopt the state court's factual findings regarding the parties' private interests, it stated these facts slightly differently in its order. Rather than finding, as the state court did, that the "vast majority" of the evidence and witnesses are located in Guatemala, the district court found that "the entirety of the witnesses except for the Plaintiffs are located in Guatemala" and that "the only evidence that is in the United States is the testimony of the Plaintiffs." Id. (emphasis added). This is not what the state court found, nor is it a proper characterization of the record before the court. Without disputing the state court's characterization that the "vast majority" of the evidence is in Guatemala, I note that the record indicates that there is indeed some other documentary evidence and witness testimony in the United States, namely, the evidence located in the Del Monte corporate offices in Florida needed to prove the Del Monte defendant's control over its alleged agents in Guatemala. Accordingly, the district court misconstrued the facts to which it was bound and misinterpreted the evidence in the record when it found that "[a]ll the other evidence is in Guatemala or in the surrounding areas" and that "[n]one of the witnesses involved in the case, except Plaintiffs, are within the reach of this Court's compulsory process." Although the majority believes this

difference is "insignificant," I am not so convinced. The difference between "none" and "some" could very well be determinative in a balancing test, particularly when weighed with the strong presumption in favor of the Plaintiffs' choice of forum.

Second, in any event, the district court was not limited by the state court's private interests analysis. As discussed above, the court could have weighed other interests, including but not limited to Plaintiffs' interest in being present for their trial, Plaintiffs' interest in avoiding the delay, and the relative ease of enforcing a judgment in either forum. Gilbert, 330 U.S. at 508 (noting that a court will consider all practical problems in order to "weigh relative advantages and obstacles to fair trial"). Also, to the extent the district court was bound by the state court's factual findings, it was not required to give the same heavy weight to these individual private interests as was given by the state court. For example, even though it could not relitigate the state courts' finding that the vast majority of evidence and testimony would be in Spanish, the district court was free to reach its own conclusion regarding the inconvenience this fact would pose on a defendant litigating in a United States federal court, as opposed to in the state court. Federal district courts, particularly those in the Southern District of Florida, are "well-equipped and experienced" in trying cases "in which many of the witnesses might speak a language other than English and in which many of the

documents may be in a language other than English." Licea v. Curacao Drydock Co., Inc., 537 F. Supp. 2d 1270, 1276 (S.D. Fla. 2008). Accordingly, although the state court found that the necessity of translating evidence and witness testimony would be particularly burdensome for a defendant in state court, the district court may have found that, considering the resources available to federal courts, this necessity imposed a "relatively light burden on [a d]efendant litigating in the U.S." Id.

If the district court had recognized that other evidence and witnesses were located in the United States, that the interests discussed by the state court could be reweighed, and that additional private interest factors could be considered, its analysis of the parties' private interests, considered in conjunction with the strong presumption this court affords to a United States resident's choice of forum, would necessarily have differed. For this reason, I conclude that the district court's finding that "the weight of private interests lies heavily in favor of the Defendants' choice of Guatemala as a forum" is tainted by its misinterpretation of the state court's factual findings and by its erroneous conclusions of law and therefore constitutes an abuse of discretion.

2. Public Interest Factors

After noting that consideration of the public interest factors was not necessary for its

decision," the district court nonetheless weighed these factors and found that "[i]t is difficult to identify any public interest factor which would weigh in favor of the Plaintiffs." Aldana, 2007 WL 3054986 at *5. I disagree.

Relevant public interest factors include: (1) administrative difficulties flowing from court congestion; (2) local interest in having localized controversies resolved at home; (3) the interest in having the trial of a diversity case in a forum that is familiar with the law governing the action; (4) the avoidance of unnecessary problems in conflicts of law or in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. SME Racks, Inc., 382 F.3d at 1100-01. In considering the public interest factors at issue in this case, the district court did not address the factors listed above; rather, after noting that "there is a strong public interest in favoring the receptivity of United States courts to claims under 28 U.S.C. § 1350," it found that "there is a greater policy interest in preventing forum shopping, as well as in protecting comity between the United States and other nations and other such interests." Aldana, 2007 WL 3054986 at *5. The district court, however, did not explain how Plaintiffs' choice of forum – in a federal court of their country of residence –

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[5] See SME Racks, Inc., 382 F.3d at 1101 (noting that if the balance of private interest factors is at or near equipoise, the court must then consider relevant factors of public interest), but see Leon, 251 F.3d at 1311 ("[T]he better rule is to consider both factors in all cases.").

constitutes forum shopping or threatens international comity. Indeed, it is perfectly reasonable for Plaintiffs to have brought this lawsuit in the court of the country of their residence, particularly because United States' [illegible] governs their claims and one of the Defendants, Del Monte, is incorporated and located in the United States. Also, because there is no pending suit or prior judgment in Guatemalan court, it is not obvious why there should be any threat to international comity in allowing Plaintiffs to file their civil suit in this country. See Ford, 319 F.3d at 1309 (holding that comity concerns are implicated where plaintiffs' ask the district court to contradict the conclusions of the Hong Kong courts and to "overlook the respect that a foreign sovereign is due")

Furthermore, the district court gave an unreasonably short shrift to the United States' strong interest in hearing claims alleging state-sponsored torture brought under the ATA and the TVPA. In enacting the ATA and the TVPA, Congress expressed "a policy favoring receptivity by our courts" to suits alleging violations of the law of nations unless the defendant has fully met the burden of showing that the *forum non conveniens* factors "tilt[ ] strongly in favor of trial in the foreign forum." Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 106 (2d Cir. 2000) (emphasis added). I conclude that the district court's vague and unexplained concerns regarding forum shopping and comity are insufficient to outweigh the United States' hefty

interest in upholding the standards of international law through the TVPA. See id. (finding that the TVPA conveys the message that "torture committed under color of law of a foreign nation in violation of international law is 'our business' . . .").

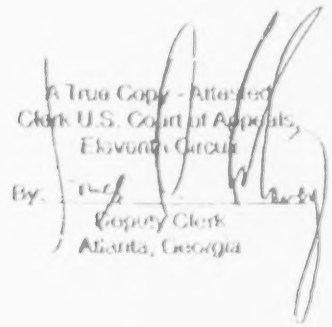
The district court also erred when it cited with approval the state court's conclusion that Plaintiffs' claims constitute a "quintessentially Guatemalan dispute" and that therefore "Plaintiffs' choice of a Florida forum imposes an inappropriately heavy burden on this Court and this community." The state court's analysis of the public interest factors implicated in the case before it is entirely inapposite here. In the action before the state court, unlike this case, the court was faced with a plethora of tort claims which were governed by Guatemala law, a fact acknowledged and considered by the state court. Aldana, No. 04-00723-CA-20, slip op. at 5 ("Furthermore, the fact that Guatemalan law will govern this dispute adds to balance weighing in favor of the Guatemalan forum."). "Even the possibility that foreign law applies in a dispute is sufficient to warrant dismissal on *forum non conveniens* grounds." Warter v. Boston Securities, S.A., 380 F. Supp. 2d 1299, 1315 (S.D. Fla. 2004); see also Gilbert, 330 U.S. at 509. In contrast, the federal claims at issue here require the court to apply United States statutory law and implicate treaty law and the law of nations. The United States has a strong interest in its courts deciding these federal claims and there would be no difficulty

regarding conflicts of law or in the application of foreign law. Accordingly, the district court erred in finding that the "state court's determinations regarding public interest factors . . . are persuasive" in this case. As a result of the errors cited above, I believe that the district court ultimately struck a balancing of the public interest factors that was an abuse of discretion.

C. Conclusion

Although a district court's decision regarding *forum non conveniens* generally "deserves substantial deference," it is only entitled to this deference "[w]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable." See Piper Aircraft Co., 454 U.S. at 257 (emphasis added). Reviewing the district court's analysis of the public and private factors, I believe that it erred by not considering all of the public and private interests and by not applying the presumptions required by law. Indeed, because it wrongly believed it was limited to considering only those private interests considered by the state court and because it misinterpreted the state court's factual findings, the district court only considered the relative advantages of the Guatemalan forum and did not consider any of the private interest factors which may have weighed in favor of suit in the United States. "Where the court does not weigh the relative advantages of the respective forums but considers only the disadvantages of one, it has

abused its discretion." SME Racks, Inc., 382 F.3d at 1100 (quoting La Seguridad, 707 F.2d at 1308)). Because I conclude the abuse of discretion standard has been met in this case, I would vacate the district court's order and remand with instructions to reconsider the balance of the public and private interests consistent with this opinion. Accordingly, I respectfully dissent.



APPENDIX B

B-1

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 01-3399-CIV-MORENO

(CLOSED CIVIL CASE)

ANGEL ENRIQUE VILLEDA ALDANA, *et al* ,
Plaintiffs,

vs.

FRESH DEL MONTE PRODUCE, INC., d/b/a DEL MONTE FRESH PRODUCE COMPANY, and COMPANIA DE DESARROLLO DE GUATEMALA, S.A. (BANDEGUA),
Defendants.

ORDER DISMISSING COMPLAINT FOR *FORUM NON CONVENIENS*

THIS CAUSE came before the Court upon Defendants' Renewed Motion to Dismiss Fourth Amended Complaint for *Forum Non Conveniens* **(D.E. No. 163)**, filed on **October 18, 2006.** This matter was referred to the Honorable Andrea M. Simonton, United States Magistrate Judge, for a Report and Recommendation. This Court does not endorse the Magistrate Judge's Report, and now **GRANTS** Defendants' motion to dismiss for *forum non conveniens*

BACKGROUND

The facts alleged in this case have been discussed in *Aldana v. Del Monte Fresh Produce, N.A , Inc.*, 416 F.3d 1242 (C.A. 11th, 2005). Plaintiffs are all

Guatemalan nationals who currently reside in the United States and bring claims under the Alien Tort Act and the Torture Victim Protection Act stemming from a labor dispute between them and the defendants.

Plaintiffs, who were officers of a trade union in Guatemala, allege that following a labor dispute in Defendants' plantation, Defendants organized an armed gang of employees and agents alongside government officials, and that this gang kidnaped the Plaintiffs. Plaintiffs allege that they were tortured, coerced into denouncing the trade union on the radio, and then exiled. Plaintiffs were granted political asylum in the United States, and in exchange they testified against their alleged attackers as part of an agreement with the Guatemalan government.

Plaintiffs Angel Enrique Villeda Aldana, Jorge Agustin Palma Romero, Oscar Leonel Guerra Evans, Lyionhel McIntosch Rodriguez and Marel Martinez, Gumerzindo Loyo Martinez and Rigoberto Alvayero Hernandez are Guatemalan nationals currently residing in the United States. Plaintiffs Aldana, Evans, Rodriguez, Marel Martinez and Hernandez are all permanent residents. Plaintiffs Romero and Loyo Martinez are in their final stages of obtaining permanent resident cards.

PROCEDURAL HISTORY

Plaintiffs filed their initial action in the United States, which became the subject of the Eleventh Circuit Court's opinion affirming this Court's order

dismissing the complaint, but reversing the dismissal of the claims under the Alien Tort Act and the Torture Victim Prevention Act.

This Court had previously denied Defendants' motion to dismiss for *forum non conveniens*, dismissed the complaint for lack of personal jurisdiction over the federal causes of action, and declined to exercise jurisdiction over the state claims. *See Aldana v. Fresh Del Monte Produce, Inc.*, 305 F.Supp.2d 1285 (S.D.Fla., 2003). This Court did so without prejudice, inviting Plaintiffs to refile a Fourth Amended Complaint prior to January 15, 2004. Plaintiffs opted not to refile, and instead appealed the ruling on subject matter jurisdiction to the Eleventh Circuit Court of Appeals while simultaneously filing their non-federal claims in Florida state court.

The Florida state court granted Defendants' motion to dismiss the claims for *forum non conveniens*, expressly noting that it was not bound by this Court's decision because it was not a "final prior judgment to which both parties are bound." Most importantly, the state court found that as a factual matter, Plaintiffs were not required to be present in Guatemala at all in order to litigate their claims, nullifying any safety concerns. In granting the dismissal, the state court qualified it by stating that Plaintiffs could seek reconsideration if any Plaintiffs were required to appear in person in Guatemala in order to litigate their claims.

After the Eleventh Circuit Court of Appeals decision, Defendants renewed their assertion that this case be dismissed for *forum non conveniens*.

I. Collateral Estoppel

Collateral estoppel operates to prevent the unnecessary relitigation of issues already decided in prior proceedings. *See e.g. Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984).

Federal courts may be collaterally estopped on a matter by state courts, due to the comity required by the Full Faith and Credit Act. 17 U.S.C. § 1783 (2007). Wherever a state court decision would estop another state court, so too does that decision estop federal courts in that state. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 519 (1986) (holding that federal courts must give the same preclusive effect to state courts as another state court would give).

Under Florida law, collateral estoppel exists where "the identical issue has been fully litigated between the same parties and the particular matter was fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction." *Paresky v. Miami-Dade County Bd. of County Comm'rs*, 893 So.2d 664, 665-66 (Fla. 3d DCA 2005) *citing Gentile v. Bauder*, 718 So.2d 781 (Fla. 1998). This state law standard is identical to the Eleventh Circuit's federal standard. *See e.g. Chazen v. Deloitte & Touche, LLP*, 2003 WL 24892029, at *1 (11th Cir. 2003) *quoting Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000).

A. The Prior Denial by This Court of a Motion to Dismiss for *Forum Non Conveniens*

This Court's prior decision to deny a motion to dismiss for *forum non conveniens* is not a binding decision upon this Court, and so the current motion to dismiss is not barred. In

situations where a federal district court has the authority to reconsider its decision, prior decisions by that court are not binding authority. *Vintilla v. United States*, 931 F.2d 1444, 1447 (11th Cir. 1991). Interlocutory orders may be reconsidered by the court at any time prior to the entry of a final judgment. *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993). Thus, this Court's order denying the motion to dismiss the Third Amended Complaint is not binding when considering the current motion to dismiss the Fourth Amended Complaint for *forum non conveniens*. *See also United States v. United Smelting, Refining & Mining Co.*, 339 U.S. 186, 199 (1949) (holding that such a determination was not binding under the "law of the case" doctrine).

B. The Florida State' Court's Order of Dismissal

In reaching its decision, the state court followed the *forum non conveniens* framework from *Kinney Sys., Inc. v. Continental Ins. Co.*, where the Florida Supreme Court had explicitly "adopted the federal doctrine of *forum non conveniens*" 674 So.2d 86, 93 (Fla. 1996).

It is not disputed that the current case involves the same litigants, and the same underlying facts as the state case. However, this court may consider the Plaintiffs' connection to the United States as a whole (as opposed to just Florida), as well as whether it is relevant that the Plaintiffs make their claim under federal anti-torture laws. While this overall analysis is broader than the state court's, that issue does not preclude this Court from being estopped by the state court as to legal and factual matters determined by the state court which were essential to its final judgment.

> Although the overall analysis required in federal court is geographically broader than the one applied by the Florida courts...*the legal and factual issues essential to the forum non conveniens judgment of the Florida court are identical to the issue before this [federal] Court*. Therefore, while the Plaintiff is not barred from challenging the ultimate judgment of the state court to dismiss the prior action for *forum non conveniens*, the *Plaintiff is barred from challenging the legal and factual issues resolved by the state court*.

Callasso v. Morton & Co., 324 F.Supp.2d 1320 (S.D. Fla. 2004) (emphasis added).

This Court is bound by the legal and factual conclusions of the Florida state court which were essential to its decision to grant a motion for *forum non conveniens*, including the fact that Plaintiffs would not be required to appear in person in Guatemala in order to litigate their claim.

II. *Forum Non Conveniens*

Forum non conveniens operates to allow a court to discretionarily exercise jurisdiction over a matter when a more convenient alternate forum is available. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-7 (1947). This tool "is to be favored" for ensuring that federal courts only hear "those cases where contacts with the American forum predominate." *Sigalas v. Dido Maritime, Inc.*, 776 F.2d 1512, 1519 n.10 (11th Cir. 1985).

The burden of proving each aspect of a *forum non conveniens* analysis is on the moving defendant.

A. The availability of an Alternative Forum

The first aspect is the existence of a viable – i.e. adequate and available – alternative forum. *See Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001). To be *available* is to be able to assert jurisdiction, typically satisfied by defendant's amenability of service. *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282 (11th Cir. 2001). To be *adequate* is to be capable of providing "some relief for the plaintiffs' claims." *See Tyco Fire and Sec., LLC v. Alcover*, 218 Fed. Appx. 860, 865 (11th Cir. 2007). This "some relief" needn't be perfect; so long as it is *something* more than "no remedy at all". *Satz*, 244 F.3d at 1283 *citing Piper Aircraft*, 454 U.S. at 255 n.22.

This Court is following the Florida state court's decision on this matter, in finding that Guatemala provides an adequate and available alternative forum for the Plaintiffs to litigate their claims.

B. The Weight of Private and Public Interests

The second aspect requires that the weight of private and public interests support disturbing the plaintiff's original choice of forum. *SME Racks*, 382 F.3d at 1101 *citing Gilbert*, 330 U.S. at 508.

There is no definitive listing of either the private or public interests applicable here. The Supreme Court has said that it may include all "practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508 (1947). However, courts have provided

examples. Private interests may include the availability of witnesses and other evidence, the costs of proceedings, and other pragmatic concerns. Public interests may include concerns of comity, the administrative burdens of trial, and the possible need to apply foreign law domestically. When plaintiffs are residents of the United States, the Eleventh Circuit has mandated that a district court "require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country." *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1101-02 (11th Cir. 2004).

Because the private interest factors involved in *forum non conveniens* cases are identical in Florida and federal law, this Court is precluded from considering a different list of private interests. Thus, this Court considers that the alleged misconduct occurred in Guatemala, that the entirety of the witnesses except for the Plaintiffs are located in Guatemala, that the vast majority of documentary evidence is in Spanish and thus would require translation for admission in this Court, and that the vast majority of witnesses do not speak English.

The *only* different private interest is that in Florida state court, the Plaintiffs were not residents of Florida and thus were not afforded a special presumption of correctness. Contrastingly, here in this Court as residents of the United States they are afforded such a presumption. This presumption, however, is *not* singularly dispositive.

The only evidence that is in the United States is the testimony of the Plaintiffs. As the Supreme Court has stated:

> A citizen's forum choice should not be

> given dispositive weight, however.... Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or for the court, dismissal is proper.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 246 n.23 (1981). In the same case, the Supreme Court noted that no single factor should be controlling, as "if central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." *Id.* at 263. "The analysis of private factors *begins* with the ease of access to evidence and the availability of witnesses." *King v. Cessna Aircraft*, Co, 405 F.Supp.2d 1374, 1378 (S.D.Fla., 2005).

All the other evidence is in Guatemala or the surrounding area. None of the witnesses involved in the case, except the Plaintiffs, are within the reach of this Court's compulsory process. Were Defendants forced to litigate their claim here, it is plausible those witnesses would be unable to be compelled to attend this Court. Moreover, the cost of transporting such evidence and witnesses would be sufficiently high as to place an unfair burden upon Defendants as compared to Plaintiffs.

Perhaps more importantly, this court is precluded from disregarding the state court's finding that Plaintiffs have no need to be in Guatemala, because this was an essential element in the state court's decision. *See e.g. Parsons Steel,*

Inc. v. First Alabama Bank, 474 U.S. 518, 522 (holding that a federal court was bound by the state court's interpretation of whether or not an earlier federal court judgment barred the state action). This fact eliminates any concern over the Plaintiffs' safety, because it consideration of whether Plaintiffs would be required to appear in person in Guatemala.

Thus, this Court finds that the weight of private interests lies heavily in favor of the Defendants' choice of Guatemala as a forum. As such the public interest factors such as concerns about forum shopping, are not necessary for this decision. However, were this Court to have found that private interests were in equipoise, the public interest factors would *also* heavily favor the Defendants' choice of forum.

The Florida state court did not consider the public interest factors, as it made its determination based on private interests. As a result, determinations in the state court regarding the weight of public interest factors are not binding upon this Court due to not being essential to the state court's decision. *See Wingard v. Emerald Venture Fla. LLC*, 438 F.3d 1288, 1293 (11th Cir. 2006) ("Under Florida law...the litigated issue must have been a crucial and necessary part of the prior determination.").

While there is a strong public interest in favoring the receptivity of United States courts to claims under 28 U.S.C. § 1350, there is a greater policy interest in preventing forum shopping, as well as in protecting comity between the United States and other nations and other such interests.

Here, there is "positive evidence of unusually extreme circumstances" in that *all* of the evidence involved, except for Plaintiffs' testimony is located in Guatemala or the surrounding area, outside of this Court's reach, and thus a

material injustice would result were Defendants forced to litigate in the United States. *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1102 (11th Cir. 2004).

As the state court concluded:

> This dispute, involving as it does one of Guatemala's largest private employers in one of Guatemala's most important economic sectors and one of Guatemala's most influential labor unions, is a quintessentially Guatemalan dispute. Plaintiffs' choice of a Florida forum imposes an inappropriately heavy burden on this Court and this community.... Guatemala, on the other hand, has a paramount interest in this dispute and its courts are more appropriate for adjudicating Plaintiffs' claims.

FNC Dismissal Order, at 4-5. Although this Court is not bound by the state court's determinations regarding public interest factors because they were not essential to the state court's decision, they are persuasive. It is difficult to identify any public interest factors which would weigh in favor of the Plaintiffs.

C. The Opportunity to Reinstate

The final aspect of *forum non conveniens* requires that *if* the motion is granted, that the plaintiff must be able to reinstate the suit in that alternative forum "without undue inconvenience or prejudice." *Calloso v. Morgan & Co.*, 324 F.Supp.2d 1320, 1330 *citing La Seguridad v. Transytur Line*,

707 F.2d 1304 1308 (11th Cir. 1983). *See also Tyco Fire & Sec. LLC. v. Alcocer*, 218 Fed. Appx. 860, 866 (11th Cir. 2007). There is no indication whatsoever that Plaintiffs will be unable to do so, and Defendants have stipulated that they are amenable to service in Guatemala.

III. CONCLUSION

THE COURT has considered the motion, response, reply, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED. Plaintiff's Claim is dismissed for *forum non conveniens* without prejudice to Plaintiff's right to seek reconsideration if any of the Plaintiffs are required to appear in person in Guatemala in order to litigate their claims.

DONE AND ORDERED in Chambers at Miami, Florida, this 16 day of October, 2007.

/s/ Federico A. Moreno
FEDERICO A. MORENO
United States District Judge

Copies provided to: counsel of record.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-15471-BB

FILED
U.S. Court of Appeals
Eleventh Circuit
Feb. 09, 2010
Thomas K. Kahn, Clerk

ANGEL ENRIQUE VILLEDA ALDANA,
JORGE AUGUSTIN PALMA ROMERO,
OSCAR LEONEL GUERRA EVANS,
LYIONHEL McINTOSCH RODRIGUEZ,
MAREL MARTINEZ, RIGOBERTO
ALVAYERO HERNANDEZ,
GUMERZINDO LOYO MARTINEZ,
Plaintiffs-Appellants,

versus

DEL MONTE FRESH PRODUCE N.A., INC.,
BANDEGUA, COMPANIA DE DESARROLLO
DE GUATEMALA, FRESH DEL MONTE
PRODUCE, INC., DEL MONTE FRESH
PRODUCE COMPANY, COMPANIA DE
DESARROLLO DE GUATEMALA, S.A.
(BANDEGUA),
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: HULL, MARCUS and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Judge's name
United States Circuit Judge

ORD-42

APPENDIX D

UNITED STATES PUBLIC LAWS
102nd Congress - Second Session
Convening January 3, 1992

COPR. © WEST 1992 No Claim to
Orig. Govt. Works

Additions and Deletions are not identified in this document. For Legislative History of Act, see LH database or Report for this Public Law in U.S.C.C. & A.M. Legislative History section.

PL 102-256 (HR 2092)
March 12, 1992
TORTURE VICTIM PROTECTION ACT OF 1991

An Act to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
– 28 USCA § 1350 NOTE –

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".
– 28 USCA § 1350 NOTE –

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY. – An individual who, under actual or apparent authority, or color of law, of any foreign nation–

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES. – A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS. – No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

– 28 USCA § 1350 NOTE –

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING. – For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are

recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE. – For the purposes of this Act –

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

*74 (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses of personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Approved March 12, 1992.

PL 102-256, 1992 HR 2092

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Supreme Court, U.S.
FILED
JUN 14 2010
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No. 09-1376

In the Supreme Court of the United States

ANGEL ENRIQUE VILLEDA ALDANA, et al.,
Petitioners,

v.

FRESH DEL MONTE PRODUCE, INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and the Eleventh Circuit, in applying this Court's well-settled standards for consideration of a *forum non conveniens* motion, properly weighed the evidence in this fact-bound and discretionary inquiry.

PARTIES TO THIS PROCEEDING

Angel Enrique Villeda Aldana, Oscar Leonel Guerra Evans, Rigoberto Alvayero Hernandez, Gumerzindo Loyo Martinez, Marel Martinez, Lyionhel Mcintosch Rodriguez, and Jorge Agustin Palma Romero, Petitioners

Fresh Del Monte Produce, Inc., Del Monte Fresh Produce Company, and Compañía De Desarrollo De Guatemala, S.A., Respondents

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Fresh Del Monte Produce, Inc. is a publicly traded company listed on the New York Stock Exchange and is the ultimate parent of Respondent, Del Monte Fresh Produce Company, and Respondent, Compañía de Desarrollo de Guatemala, S.A., via indirect ownership.

No public company owns 10% or more of any Respondent's stock.

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STATEMENT OF THE CASE

A. Introduction

This case presents the unremarkable question of whether the Court of Appeals and the district court, in explicitly considering and applying well-settled legal principles, accorded proper weight to the record evidence and properly balanced the *forum non conveniens* factors in dismissing the Petitioners' fourth amended complaint. In the face of this enormously fact-bound determination, the Petitioners strain to create the illusion of inter-circuit splits and important questions of federal law where neither exist. The Petition is in reality a last-ditch effort to have this Court reweigh the record evidence already twice examined and weighed by the Court of Appeals and the district court below.

There is no division among the circuits on any question the Petitioners present. This Court long ago established the legal principles applicable to a *forum non conveniens* inquiry, principles to which the Court of Appeals and the district court faithfully adhered. The federal courts consistently recognize this Court's longstanding admonitions that the touchstone of the *forum non conveniens* doctrine is flexibility, and that no one factor in the *forum non conveniens* analysis can be given singularly dispositive weight.

The Petitioners, however, suggest that some federal courts have elevated certain interest factors in the *forum non conveniens* mix above all others and have accorded these "favored" interest factors paramount weight. That, of course, is not the law in any federal circuit and there is no conflict. No federal court has

ever suggested that any one factor in a *forum non conveniens* analysis is to have the overriding weight the Petitioners would hope to assign, and doing so would contravene the legal principles this Court long ago established and which lie at the very heart of the *forum non conveniens* doctrine. In short, none of the Petitioners' three arguments has merit.

The Petitioners first argue, entirely without support, that a *forum non conveniens* dismissal of their claims for mental torture under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 (note), is overwhelmingly disfavored and further argue that the Court of Appeals failed to follow this so-called rule in conflict with decisions of the Second and Ninth Circuits. *See* Petition for Writ of Certiorari ("Petition") at 9-13. Not surprisingly, the case law the Petitioners cite is wholly inapposite or contradicts their distorted view and plainly reveals that no such rule exists.

The Petitioners next assert, improperly for the first time in the Petition, that when a case is pending in a domestic defendant's home forum, the United States has an overwhelming interest in the accountability of its citizens sufficient to overcome the combined weight of all other *forum non conveniens* interests. *See id.* at 13-17. The Petitioners' argument is not only untimely, it is contrary to settled law. Again, Petitioners fail to cite any authority supporting their claimed inter-circuit conflict or any other basis to warrant this Court's review.

Finally, the Petitioners contend that because the Petitioners are U.S. residents who were granted asylum due to the alleged incidents giving rise to their

ATS and TVPA claims, the Court of Appeals, in a "clear split with other circuits," failed to give adequate weight to the Petitioners' choice of forum. *See id.* at 17-20. The Petitioners, of course, fail to identify any split among the circuits. Moreover, the Court of Appeals explicitly acknowledged the Petitioners' U.S. residency and accorded their forum choice the heightened deference it was due pursuant to this Court's well-settled *forum non conveniens* jurisprudence. Further, because the narrow set of factual circumstances the Petitioners portray will so rarely occur, and the question is of importance to the Petitioners only, as opposed to the public as a whole, there is nothing to warrant this Court's review.[1]

In sum, the Petitioners' real quarrel is with the discretionary balancing determination of the district court and the appropriately deferential review of the Court of Appeals, which found that, in this record, the *forum non conveniens* interests the Petitioners emphasize were substantially outweighed by the remaining private and public interests taken as a whole. The Court of Appeals' and the district court's decisions are in perfect harmony with applicable legal principles and the decisions of other federal courts applying *forum non conveniens* to ATS and TVPA claims.

---

[1] In addition, the Petitioners' request for "clarification" based on a presumed need for the district court to protect their safety is a red herring. The district court in this case directly addressed the Petitioners' safety concerns when it expressly conditioned its dismissal upon the Petitioners' "right to seek reconsideration if any of the [Petitioners] are required to appear in person in Guatemala to litigate their claims." *See* Petition, App. at B-12.

Accordingly, the Petition should be denied.

B. Course of Proceedings

On August 2, 2001, some of the Petitioners filed a Complaint for Equitable Relief and Damages ("Complaint") in the United States District Court for the Southern District of Florida against Respondent, Fresh Del Monte Produce, Inc. The twelve-count Complaint alleged claims under the ATS, the TVPA, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et. seq.* ("RICO"), together with numerous pendent non-federal law claims arising out of an altercation that occurred in Guatemala on October 13-14, 1999.

On February 5, 2003, after several amendments and joinder of new parties, the Petitioners filed a Third Amended Complaint for Equitable Relief and Damage ("Third Amended Complaint"), alleging the same twelve counts against Respondents, Fresh Del Monte Produce, Inc. ("FDMPI"), Compañía de Desarrollo Bananero de Guatemala, S.A. ("Bandegua"), and Del Monte Fresh Produce Company ("DMFPC") (collectively "Respondents").

In April 2003, Respondents filed a Consolidated Motion to Dismiss Third Amended Complaint (1) for Lack of Subject Matter Jurisdiction, (2) for Failure to State Claims Upon Which Relief Can Be Granted, (3) for *Forum Non Conveniens*, and (4) for Lack of Personal Jurisdiction on behalf of Bandegua.

On June 4, 2003, the district court denied Respondents' *forum non conveniens* motion, but on December 12, 2003, dismissed without prejudice the

Petitioners' Third Amended Complaint for lack of federal subject matter jurisdiction.[2] The district court expressly granted the Petitioners leave to file another amended complaint. However, instead of amending, the Petitioners strategically chose to appeal the district court's subject matter jurisdiction order and simultaneously file their non-federal claims in the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida (hereinafter the "State Court Action").

The Petitioners' State Court Action was against the same defendants and asserted common-law tort claims based on the identical facts and circumstances alleged in the Third Amended Complaint. The Respondents moved, *inter alia*, to dismiss Petitioners' State Court Action pursuant to the doctrine of *forum non conveniens*.

On March 30, 2005, after jurisdictional and *forum non conveniens* discovery in the State Court Action, and upon consideration of the legal memoranda and evidence submitted by the parties, including expert affidavits and depositions, the state court dismissed the Petitioners' State Court Action in favor of Guatemala pursuant to the doctrine of *forum non conveniens*. The state court found, in relevant part:

> An adequate alternate forum exists for these Plaintiffs in Guatemala and Guatemala possesses jurisdiction over the entire case, including all of the parties. . . . The private interest factors

---

[2] The Petitioners' RICO claim was dismissed with prejudice.

> weigh heavily in favor of the Guatemalan forum [and] . . . the public interest factors also heavily favor the Guatemalan forum. . . .
>
> This dispute, involving as it does one of Guatemala's largest private employers in one of Guatemala's most important economic sectors and one of Guatemala's largest and most influential labor unions, *is a quintessentially Guatemalan dispute*.

Villeda Aldana v. Fresh Del Monte Produce, Inc., No. 04-00723 CA 20, slip op. (Fla. Cir. Ct. Mar. 30, 2005) (emphasis added), appended hereto as Appendix 1, at 2b-5b. The state court expressly conditioned its *forum non conveniens* dismissal on the Petitioners not being required to be physically present in Guatemala to testify or litigate their claims. *Id.* at. 5b-6b. The Petitioners appealed the state court's *forum non conveniens* dismissal and the Florida Third District Court of Appeal affirmed. *Aldana v. Fresh Del Monte Produce Inc.*, 922 So. 2d 212 (Fla. Dist. Ct. App.), *rev. dism.*, 928 So. 2d 334 (Fla. 2006).

On July 8, 2005, the Eleventh Circuit rendered its opinion in the Petitioners' initial appeal in Case No. 04-10234-HH concerning the district court's subject matter jurisdiction dismissal order. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005), *cert. denied*, 549 U.S. 1032 (2006) (hereinafter, "*Aldana I*"). The Court of Appeals affirmed the dismissal of all of the Petitioners' claims for lack of federal subject matter jurisdiction, with the exception of the Petitioners' ATS and TVPA claims alleging torture based on intentionally inflicted mental

pain and suffering. *Id.* After the Respondents' petition for rehearing was denied, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284 (11th Cir. 2006), the action was remanded to the district court in June 2006.

On September 8, 2006, the Petitioners filed their Fourth Amended Complaint, and, in response, the Respondents filed their Renewed Motion to Dismiss Fourth Amended Complaint for *Forum Non Conveniens*. In large measure, the Respondents contended that the district court was required to afford full faith and credit to the state court *forum non conveniens* judgment, and that the Petitioners were precluded from relitigating facts and issues necessarily decided by the state court's final *forum non conveniens* judgment. Following a referral of the motion to a Magistrate Judge, the Magistrate Judge issued a Report and Recommendation recommending denial of Respondents' Renewed Motion to Dismiss the Fourth Amended Complaint for *Forum Non Conveniens*, to which the Respondents objected.

On October 16, 2007, the district court rejected the Report and Recommendation and issued an Order Dismissing Complaint for *Forum Non Conveniens*. *See Villeda-Aldana v. Fresh Del Monte Produce, Inc.*, No. 01-3399-civ, 2007 WL 3054986 (S.D. Fla. Oct. 16, 2007). The district court concluded that it was not precluded from reconsidering its earlier *forum non conveniens* order. *Id.* at *2. Furthermore, the district court held that, pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, it was "bound by the legal and factual conclusions of the Florida state court which were essential to [the state court's] decision to grant a motion for *forum non conveniens*." *Id.* at *3. The

district court then performed a thorough review and balancing of the *forum non conveniens* factors this Court enumerated in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See Villeda-Aldana*, 2007 WL 3054986, at *3-5. Concerned about the Petitioners' claims for their safety if they were required to return to Guatemala to testify in person, the district court dismissed the Fourth Amended Complaint "without prejudice to [the Petitioners'] right to seek reconsideration if any of the [Petitioners] are required to appear in person in Guatemala in order to litigate their claims." *Id.* at *6.

The Petitioners appealed the district court's *forum non conveniens* dismissal order, and the Court of Appeals affirmed. The Court of Appeals, as did the district court, applied the well-settled *Piper* and *Gilbert* interest factors and held that, given the discretionary nature of the district court's determination and the deferential level of review, the district court had not abused its discretion in concluding that the weight of the *forum non conveniens* balance heavily favored dismissal in favor of Guatemala. *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1299-1300 (11th Cir. 2009), (hereinafter "*Aldana II*"). In so concluding, the Court of Appeals expressly noted that "the district court clearly recognized that, since the appellants lived in their chosen forum for the purposes of the federal analysis, this factor weighed heavily in their favor." *Id.* at 1293. The Court of Appeals further noted that the district court "explicitly acknowledged the 'strong public interest in favoring receptivity of the United States courts to [ATS and TVPA] claims.'" The Court of Appeals concluded that "the district court weighed these various factors in a reasonable fashion and

determined that Guatemala's interest was stronger than the United States." *Id.* at 1299. The Petitioners then filed a petition for rehearing and rehearing *en banc*, which the Court of Appeals denied. *See* Petition, App. C.

C. Statement of the Facts

Bandegua is a Guatemalan company that owns, leases, and operates banana farms only in Guatemala. Bandegua, at one time, operated the Bobos banana plantation in Morales, Izabal, Guatemala, where the incidents giving rise to the Petitioners' claims took place. Bandegua does not export, sell, or distribute fresh fruit or any other products into the United States and has no employees, business agents or contractors in Florida or the United States.

Petitioners are Guatemalan citizens who lived and worked in Morales, Guatemala. Petitioners were officers of a Guatemalan labor union, Sindicato de Trabajadores del Banano de Izabal ("SITRABI"), which represented the workers at the Bobos plantation. In September 1999, Bandegua announced it was closing its Bobos operations and laying off 918 plantation workers, all SITRABI members.

The Fourth Amended Complaint alleges that on October 13-14, 1999, the Petitioners were rounded up by a mob of townspeople in Morales, Guatemala, and, after being threatened at gun point, were forced to resign their positions with Bandegua and SITRABI. The Petitioners allege that the Respondents coordinated the assault. After a total of approximately eight hours, all of the Petitioners were released and none was physically injured.

Following the incident, the Guatemalan police made several arrests, and a criminal trial was conducted in Morales, Guatemala. The Petitioners testified in person at the trial against the perpetrators. During the criminal prosecution, the Guatemalan government provided housing and around-the-clock police protection to the Petitioners and their families in Guatemala City. At the conclusion of the criminal trial, the perpetrators were convicted of their crimes. Approximately seventeen months after the incident in Morales, the Petitioners, Aldana, Romero, Evans, Rodriguez, and Marel Martinez, were relocated (with the Respondents' financial and non-financial assistance) to the United States, where these Petitioners now claim to reside. More than two years after the incident, the Petitioners, Loyo Martinez and Hernandez, moved to the United States, where they now also claim to reside.

REASONS FOR DENYING THE PETITION

None of the Petitioners' flawed arguments constitutes a "compelling reason" sufficient for this Court to grant certiorari review of this matter in accordance with Rule 10 of the Rules of the Supreme Court of the United States. Contrary to the Petitioners' contentions, not only is the Court of Appeals' decision correct, its decision is not "in conflict with the decision of another United States court of appeals on the same important matter," nor has the Court of Appeals "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(a), (c).

I. There is No Split Among The Circuits As The Petitioners Simply Complain About The Application of Well-Settled *Forum Non Conveniens* Principles And Request This Court To Reweigh The Record Evidence In This Fact-Specific, Flexible, And Discretionary Inquiry.

The Petitioners' lead argument is that there is a "clear split" between the Eleventh Circuit, on the one hand, and the Second and Ninth Circuits, on the other, regarding the weight due the United States' interest in upholding its obligations under international law in a *forum non conveniens* analysis. The thrust of the Petitioners' argument is that, contrary to the decision of the Court of Appeals below, the Second and Ninth Circuits overwhelmingly disfavor *forum non conveniens* dismissals of ATS and TVPA claims. *See* Petition at 9-13. The Petitioners' argument is wrong.

First, none of the cases the Petitioners cite from the Second and Ninth Circuits supports their view. From the Ninth Circuit, the Petitioners rely on *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088 (9th Cir. 2009) and *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008). *See* Petition at 10-11. However, *Bauman* did not involve *forum non conveniens*. Rather, *Bauman* concerned an issue of personal jurisdiction on the basis of an agency relationship. *Bauman*, 579 F.3d at 1093-94. Moreover, the Petitioners quote language from ***the dissent*** in *Bauman* concerning agency personal jurisdiction and pass it off as a "holding" regarding *forum non conveniens*. *Compare* discussion of *Bauman* in Petition at 10-11 *with* dissent by Judge Reinhardt in *Bauman*, 579 F.3d at 1104-05. Further, on May 6, 2010, the Ninth Circuit granted rehearing in *Bauman*

and vacated the appellate court's prior decision and ordered supplemental briefing on agency personal jurisdiction issues. *See Bauman v. DaimlerChrysler Corp.*, 603 F.3d 1141 (9th Cir. 2010).

Rio Tinto is similarly inapposite. *Rio Tinto*, like *Bauman*, did not involve *forum non conveniens*. Instead, *Rio Tinto* concerned whether exhaustion of local remedies is a prerequisite to invoking a United States court's jurisdiction under the ATS. *See Rio Tinto*, 550 F.3d at 824-25. Consequently, nowhere in *Rio Tinto* did the Ninth Circuit hold that "[t]he U.S. interest in addressing violations of international prohibitions disfavors dismissal of ATS and TVPA cases *on forum conveniens* grounds," as Petitioners audaciously claim. *See* Petition at 12. In fact, the Ninth Circuit has actually expressed a contrary view. *See In re Estate of Ferdinand Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992) ("Such limitations as venue and the doctrine of forum non conveniens are available in § 1350 cases as in any other.")

Likewise, the Second Circuit cases relied upon by the Petitioners are of no support. For example, as noted by the Court of Appeals below, *see Aldana II*, 578 F.3d at 1299-1300 n.10, the Second Circuit in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), recognized that in TVPA cases, Congress "has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts," but acknowledged:

> This is not to suggest that the TVPA has nullified, or even significantly diminished, the doctrine of *forum non*

> *conveniens*. The statue has, however, communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business. The TVPA in our view expresses a policy favoring our courts' exercise of the jurisdiction conferred by the [ATS] in cases of torture unless the defendant has fully met the burden of showing that the *Gilbert* factors 'tilt strongly in favor of trial in the foreign forum.'

Id. at 106 (citation omitted).

Here, unlike the district court in *Wiwa*, which wholly "failed to count in favor of retention the interest of the United States, as expressed in the TVPA," *see id.*, the Court of Appeals acknowledged that the district court properly considered the public policy interests as articulated in *Wiwa*, *see Aldana II*, 578 F.3d at 1299, and did not abuse its discretion in nevertheless ruling that on this record the *Gilbert* factors tilted strongly in favor of a trial in Guatemala. *See id.* at 1299-1300.

Moreover, the Second Circuit's decision in *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) is also inapposite. Contrary to the Petitioners' suggestions, *Jota* did not concern a court's failure to consider the policy favoring adjudication of TVPA lawsuits in the United States. Rather, the *Jota* Court held that the *forum non conveniens* dismissal there was erroneous because the district court had failed to require the defendant to submit to jurisdiction in the alternate forum, and because the district court had adopted

another district court's weighing of the relevant factors. *Id.* at 155. The *Jota* Court explicitly stated, "[w]e express no view. . . on how the forum non conveniens balance for [ATS] claim is to be struck when alien plaintiffs select a United States forum for a suit against a domestic corporation." *Id.* at 159 n.6. The Petitioners' contention of a "clear split" among the circuits is, at best, imagined.

The reality is that, contrary to the Petitioners' contention, the federal courts consistently heed this Court's admonition that "[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." *Piper*, 454 U.S. at 249-50. This Court has further made plain that its *forum non conveniens* decisions have "repeatedly emphasized the need to retain flexibility," *id.* at 262, and that "[e]ach case turns on its own facts." *Williams v. Green Bay & W. R. Co.*, 326 U.S. 549, 557 (1946).

Because of this need for flexibility, contrary to the Petitioners' claim, no court has ever given dispositive weight to the interest of the United States under the ATS or the TVPA or held that the *forum non conveniens* doctrine does not apply to such cases. Indeed, just the reverse is true. *See, e.g.*, *Turedi v. Coca-Cola Co.*, 343 Fed.Appx. 623 (2d Cir. 2009) (affirming *forum non conveniens* dismissal of an ATS and TVPA case against two United States companies in favor of Turkey); *Wiwa*, 226 F.3d at 106 ("This is not to suggest that the TVPA has nullified, or even significantly diminished, the doctrine of *forum non conveniens.*"); *In re Estate of Ferdinand Marcos*, 978 F.2d at 500 ("Such limitations as venue and the doctrine of forum non conveniens are available in

§ 1350 cases as in any other."); *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495, 505 n.6 (S.D.N.Y. 2005) (plaintiffs' choice of forum is not entitled to any greater deference because they have alleged ATS and TVPA claims); *United Bank for Africa PLC v. Coker*, No. 94-civ-0655, 2003 WL 22741575, at *6 (S.D.N.Y. Nov. 18, 2003) (holding even if claims are made under the ATS and TVPA, a "balance of factors [in this case] would still militate in favor of dismissal of the false imprisonment claim on *forum non conveniens* grounds"); *Robert v. Bell Helicopter Textron, Inc.*, 2002 WL 1268030, at *2 (N.D. Tex. May 31, 2002) (ATS did not preclude court from dismissing on *forum non conveniens* grounds); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 553 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002) ("The United States therefore has no special public interest, under the [ATS] or otherwise, in providing a forum for plaintiffs pursuing an international law action against a United States entity that plaintiffs can adequately pursue in the place where the violation actually occurred.").[3]

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[3] The Court of Appeals and the district court's balancing of the United States' interests in prosecuting TVPA and ATS claims against other *forum non conveniens* interests is not only consistent with and required by this Court's jurisprudence, it is also consistent with Congress' intent:

> Striking a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. Courts, *the bill recognizes as a defense the existence of adequate remedies in the country where the violation allegedly occurred*.

H.R. Rep. No. 102 - 367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87 (emphasis added). The legislative history of the TVPA shows that congressional intent was not to bar the dismissal of any claims from the United States Courts, but rather

In short, both the Court of Appeals and the district court below conducted a traditional and complete *forum non conveniens* analysis pursuant to this Court's established and well-settled *forum non conveniens* jurisprudence and consistent with the approach of the federal courts throughout the country. Both lower courts considered whether Guatemala was an adequate alternative forum. *Aldana II*, 578 F.3d 1289-92; *cf. Piper*, 454 U.S. at 254 n.22 ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum."). Both courts undertook a thorough examination and weighing of the relevant *Gilbert* private interest factors, *Aldana II*, 578 F.3d at 1292-98, and public interest factors, including an explicit discussion and weighing of the United States' interest in adjudicating ATS and TVPA claims. *Id.* at 1298-1300. Simply put, there is no split between the Eleventh Circuit and its sister circuits.

In truth, the Petitioners' argument is but a last-ditch attempt to have this Court reweigh the evidence carefully examined and balanced twice before by the Court of Appeals and the district court in this immensely fact-bound, flexible, and discretionary analysis. This is precisely a task this Court ought not perform. *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *see Graver Tank & Mfg. Co. v. Linde Air Prods., Co.*, 336 U.S. 271, 275

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to "avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries." H.R. Rep. No. 102 - 367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88.

(1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."). *See also* Sup. Ct. R. 10(c) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Accordingly, the Petition should be denied.

II. The Court Of Appeals' Consideration Of The *Forum Non Conveniens* Factors Is Consistent With Well-Established Principles As There Is No Paramount Public Policy Interest In "Accountability" To Deny Dismissal On *Forum Non Conveniens* Grounds.

The Petitioners contend, entirely without support and for the first time in their Petition, that the United States has an overwhelming interest in the "accountability" of its citizens that somehow mandates rejection of a *forum non conveniens* motion where the United States is the defendant's home forum and the plaintiff is a United States resident. *See* Petition at 13-17. The Petitioners also claim that the Court of Appeals' decision conflicts with the decisions of other Circuits and undermines this alleged dominant interest of the United States. *Id.* The argument has no merit.

First, the Court should flatly reject the argument because neither court below ever had an opportunity to consider it. "This Court sits as a court of review. It

is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also United States v. Williams*, 504 U.S. 36, 41 (1992) (The Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below.") (internal citation omitted); *United States v. Lovasco*, 431 U.S. 783, 788 (1977) (argument not raised in the district court or the Court of Appeals will not be reviewed absent exceptional circumstances). There is nothing exceptional about this case or the Petitioners' untimely argument to merit further consideration.

Second, contrary to the Petitioners implication, no court has ever announced or applied, in an ATS, TVPA or any other case, a rigid rule that a U.S. court can never decline jurisdiction under *forum non conveniens* in a suit between U.S. persons or entities, irrespective of the underlying facts or circumstances. Indeed, this Court has explicitly refused to lay down any unbending rule in the *forum non conveniens* context. *Piper*, 454 U.S. at 249 (Court announces that it has refused to "lay down a rigid rule to govern discretion, and that '[e]ach case turns on its facts.'").

In fact, the Second Circuit's decision in *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003), which Petitioners erroneously cite in support, reinforces this very point. "A court considering a motion for dismissal on the grounds of *forum non conveniens* does not assign 'talismanic significance to the citizenship or residence of the parties,' and there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their

causes dismissed for *forum non conveniens*." *Id.* at 73 (citation omitted). This is true even where a plaintiff chooses the home forum of a United States defendant.

Nonetheless, the Petitioners incorrectly cite *Pollux* for the proposition that "the fact that the U.S. is the Respondents' home forum must be afforded significant weight," Petition at 15, when in fact, the *Pollux* court stated that such a circumstance "only merits heightened deference to the extent that the plaintiff and the case possess *bona fide* connections to, and convenience factors favor, that forum." *Pollux*, 329 F.3d at 74. Importantly, nowhere did the Second Circuit hold that a court should eschew the balancing of private and public interest factors simply because a plaintiff chose a U.S. defendant's home forum.

> Although a plaintiff's choice of forum will not necessarily merit less deference because plaintiff is suing outside her home forum, such a choice made to obtain jurisdiction over defendant is an instance where substantial deference would still generally be appropriate. *But, it is an untenable leap of logic to jump from that holding to the blanket assertion that a plaintiff's choice of forum deserves presumptive deference simply because the chosen forum is defendant's home forum. . . . [A] plaintiff's choice to initiate suit in the defendant's home forum – as opposed to any other where the defendant is amenable to suit – only merits heightened deference to the extent the plaintiff and the case possess bona fide connections to, and convenience factors favor, that forum.*

Id. at 74 (emphasis added). In the end, the Second Circuit affirmed the district court's dismissal of the case for *forum non conveniens* despite the fact that it was brought in the defendant, Chase Manhattan Bank's, home forum. *Id.* at 67-68, 77.

The remaining case law the Petitioners cite for support is inapposite,[4] unremarkable,[5] or distinguishable.[6] Simply put, no case the Petitioners

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[4] *Garrity v. United States*, 67 F. Supp. 821 (Ct. Cl. 1946), involved a landlord-tenant dispute with no discussion whatsoever of *forum non conveniens*. In *Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009), on appeal from a dismissal of the action by the district court on *forum non conveniens* grounds, the defendant/appellee did not seek affirmance of the dismissal due to developments in the alternate forum, and the appellate court granted the plaintiff/appellant's request to remand the matter to the district court without ruling on the issue, aside from providing "guidance" in dicta. *Id.* at 189.

[5] *Founding Church of Scientology of Washington, D.C. v. Verlag*, 536 F.2d 429 (D.C. Cir. 1976) and *Horovitz v. Renault, Inc.*, 162 F. Supp. 344 (S.D.N.Y. 1958), involved, respectively, a reversal and a denial of dismissal on grounds of *forum non conveniens* for fact-based reasons, without making significant pronouncements in the law.

[6] In *Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2d Cir. 2006), the appellate court reversed dismissal on *forum non conveniens* grounds because the district court, in balancing the conveniences, gave "the plaintiff's choice of forum no weight whatsoever." *Id.* at 179-80. Likewise, in *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1898), and *Reid-Walen v. Hansen*, 933 F.2d 1390, 1396 (8th Cir. 1991), the district court, respectively, failed to explain what deference it was giving the plaintiff's choice of forum, or gave it very little weight. That was not the case with the district court below.

cite stands for the proposition that the United States has an overwhelming interest in the accountability of its citizens or even that a U.S. court cannot dismiss an action on *forum non conveniens* grounds in a suit between U.S. persons or entities. There is, of course, no conflict of any kind among the Circuit Courts regarding this issue.

The fact is that the *forum non conveniens* doctrine applies in full measure in ATS and TVPA cases, and in cases involving U.S. resident plaintiffs and defendants. Cases with differing results are due to the doctrine's inherent and indispensable flexibility and the unique facts and circumstances of each case. That, of course, is as it should be. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 528-29 (1988) ("As we previously have recognized, the district court is accorded substantial flexibility in evaluating a *forum non conveniens* motion . . . and each case turns on its facts.") (internal quotations omitted); *see also Piper*, 454 U.S. at 249-50.

Accordingly, the Petition should be denied.

III. The Court Of Appeals Afforded Proper Weight To The Petitioners' Choice Of Forum, And There Is No Split Or Need For This Court To Revisit *Piper* And *Gilbert*.

The Petitioners finally argue that the Court of Appeals failed "to accord proper weight to Petitioners' choice of forum," thereby contravening this Court's holding in *Gilbert*, 330 U.S. 501, and creating a "conflict with other circuits which have held that the U.S. residence of a plaintiff is a significant private interest factor that must be taken into consideration in

a *forum non conveniens* inquiry." Petition at 17. The Petitioners' contention is simply wrong, and the Court of Appeals' decision is not in conflict with any of decision of its sister courts.

This Court long ago said that "the distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified" and that "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." *Piper*, 454 U.S. at 255. But, this Court further explained that:

> [a] citizen's forum choice should not be given dispositive weight, however. Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his own forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.

Id. at 255-56 & n.23 (citations omitted).

The Court of Appeals and the district court applied these well-settled principles and accorded the heightened deference due the Petitioners' choice of forum. The Court of Appeals said:

> The district court clearly recognized that, since the appellants lived in their chosen forum for purpose of the federal analysis, this factor weighed heavily in their favor. The district court squarely took account

> of our requirement that there be positive evidence of unusually extreme circumstances, and that the court be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country.

See Aldana II, 578 F.3d at 1293-94 (internal quotations omitted). The Petitioners' disingenuous claim that the Court of Appeals contravened *Gilbert* for failing to accord due weight to the Petitioners' choice of forum, *see* Petition at 17-18, is well wide of the mark. Moreover, aside from citing the Second Circuit's decision in *Wiwa*, 226 F.3d 88, *which is not in conflict with the Court of Appeals' decision in this case*, *see supra* at 12-13, the Petitioners fail to identify a single conflict with the Court of Appeal's decision.

Similarly lacking in merit is Petitioners' argument that this Court grant certiorari to "clarify the weight to be accorded a non-citizen U.S. resident's choice of forum" in ATS and TVPA cases based on the same facts supporting asylum. Petition at 20. For reasons already discussed, the Court's *forum non conveniens* pronouncements on the deference due a domestic plaintiff's forum choice are well-settled and more than adequately answer the question Petitioners submit. *See Piper*, 454 U.S. at 255. The Petitioners have utterly failed to articulate any reason, never mind a compelling reason, for the Court to revisit this well-settled law.

Moreover, this Court should refuse to exercise its extraordinary certiorari jurisdiction to address a

question that only can arise on the rarest occasions when an alien who has been granted asylum in the United States files an ATS and TVPA suit against a U.S. company based on facts that lead to the grant of asylum. This extremely limited issue does not warrant the Court's review. *See Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.").

In addition, the Petitioners' request is another red herring. It is based on the supposed need for the district court to consider and protect the Petitioners' safety. However, as the Court of Appeals correctly noted in reviewing the district court's analysis concerning the adequacy of the Guatemalan forum, *see Aldana II*, 578 F.3d at 1288 & 1291 n.3, the Petitioners' safety was "effectively addressed" when the district court's dismissal was expressly conditioned upon the Petitioner's "'right to seek reconsideration if any of the [Petitioners] are required to appear in person in Guatemala in order to litigate their claims.'" *See Villeda-Aldana*, 2007 WL 3054986, at *6.

Finally, the Petition ends, much as it begins, with an erroneous argument in direct conflict with the record. The Petitioners' assertion that the "undue delay and prejudice to the Petitioners should have been among the factors weighed in any *forum non conveniens* analysis," stands in stark contrast to the fact that the Court of Appeals explicitly addressed the

Petitioners' argument regarding delay, *Aldana II*, 578 F.3d at 1296-97, and did so even though the Petitioners failed to raise the argument before the district court below. *Aldana II*, 578 F.3d at 1296 & n.6. Nothing in the Petitioners' last argument, or any of their arguments, warrants this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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APPENDIX 1

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 04-00723 CA 20

[Filed March 30, 2005]

ANGEL ENRIQUE VILLEDA ALDANA, JORGE AGUSTIN PALMA ROMERO, OSCAR LEONEL GUERRA EVANS, LYIONHEL McINTOSCH RODRIGUEZ, MAREL MARTINEZ, GUMERZINDO LOYO MARTINEZ, and RIGOBERTO AVAYERO HERNANDEZ,	)
Plaintiffs,	)
vs.	)
FRESH DEL MONTE PRODUCE INC., DEL MONTE FRESH PRODUCE COMPANY, and COMPAÑIA DE DESARROLLO BANANERO DE GUATEMALA, S.A. (BANDEGUA),	)
Defendants.	)

ORDER GRANTING MOTION TO DISMISS PURSUANT TO DOCTRINE OF *FORUM NON CONVENIENS*

THIS CAUSE came on before the Court pursuant to notice on February 4, 2005 on Motion to Dismiss Pursuant to Doctrine of *Forum Non Conveniens* of the Defendants, Fresh Del Monte Produce Inc. ("FDMPI"), Del Monte Fresh Produce Company ("DMFPC"), and Compañia de Desarrollo Bananero de Guatemala, S.A. ("Bandegua"). The Court having considered the motion, the responses thereto, all the matters of record filed therewith, having reviewed and considered the file, and having heard argument of counsel, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Defendants' Motion to Dismiss Pursuant to Doctrine of *Forum Non Conveniens* be and the same is hereby **GRANTED**, subject to the conditions set forth in paragraph 3 of this Order.

2. The Court has considered the requisites of Rule 1.061 of the Florida Rules of Civil Procedure and *Kinney System, Inc. v. Continental Insurance* Co., 674 So. 2d 86 (Fla. 1996) and its progeny. In so doing, the Court finds as follows:

a. An adequate alternate forum exists for these Plaintiffs in Guatemala and Guatemala possesses jurisdiction over the entire case, including all of the parties. The Court finds that the testimony submitted by the Defendants' expert, Francisco Chavez Bosque, is more reliable, credible and persuasive than that of the Plaintiffs' expert. The Court finds that the courts of Guatemala are not foreclosed to these Plaintiffs and that the

Guatemalan courts have jurisdiction over these Defendants for the matters alleged in Plaintiffs' Complaint. The Court further finds that the courts of Guatemala are adequate to adjudicate the Plaintiffs' claims.

b. Plaintiffs have raised several issues concerning the adequacy of Guatemalan courts, primarily that the Guatemalan court in the underlying criminal matter which gave rise to this action, after hearing Plaintiffs' testimony at trial found individual defendants guilty but imposed lenient sentences. In essence Plaintiffs ask this Court to look behind whatever judicial determination the Guatemalan judge made in the exercise of his or her individual discretion in sentencing. The fact that a Guatemalan court provided a criminal forum, took testimony and found the defendants guilty in the underlying cause belies Plaintiffs position. The fact that Plaintiff is unhappy with the sentence imposed and asks this court to second guess the reasons for that sentence is to ask this Court to presume what was on the sentencing judge's mind. To do so, with the record presented, would be an act of judicial arrogance.

c. Plaintiffs assert that because this particular motion was litigated before the Honorable Federico A. Moreno, United States District Court Judge in and for the Southern District of Florida and because Judge Moreno denied the Defendants' Motion to Dismiss that this Court is bound by the doctrine of collateral estoppel to also deny the motion. This Court finds Judge Moreno's decision to be persuasive. Judge Moreno found that because United States Department of State granted

Plaintiff herein political asylum as a result of their ordeal which allegedly gave rise to this action and because of their participation in the criminal matter in Guatemala that the Defendant's motion to Dismiss for *Forum Non Conveniens* should be denied. However, thereafter Judge Moreno dismissed the federal case. Therefore, there is no prior final judgment to which both parties are bound. *Prudential Ins. Co. v. Turkal*, 528 So.2d 487 (Fla. 3d DCA). Defendants' now assert that at the time they argued the *Forum Non Conveniens* motion before Judge Moreno they neglected to advise Judge Moreno of the provision of Guatemalan law which allows the Plaintiffs' testimony at trial to be presented by deposition which can be taken outside of the country. Nor, they assert did they advise Judge Moreno that Guatemalan law does not require the presence of parties before the court for a trial. This Court is concerned however about the safety of the Plaintiffs in view of the fact that the United States Department of State has seen fit to grant them political asylum. Therefore, paragraph 3 hereof sets conditions for the granting of this Order.

d. The private interest factors weigh heavily in favor of the Guatemalan forum. The Plaintiffs are all Guatemalan nationals who reside outside of the state of Florida and are, therefore, entitled to little or no deference for their choice of Florida as the forum for the litigation of their claims. Here, the alleged misconduct of which the Plaintiffs complain occurred in Guatemala, the vast majority of the witnesses and documentary evidence are located in Guatemala or in countries close to Guatemala, the vast majority of the documentary evidence is in

Spanish and would have to be translated at great expense to the parties, and the witnesses either do not speak English or Spanish is their native language.

e. Because the private interest factors weigh so heavily in favor of the alternate forum, the Court is not required to consider the public interest factors. Nevertheless, the public interest factors also heavily favor the Guatemalan forum. This dispute, involving as it does one of Guatemala's largest private employers in one of Guatemala's most important economic sectors and one of Guatemala's largest and most influential labor unions, is a quintessentially Guatemalan dispute. Plaintiffs' choice of a Florida forum imposes an inappropriately heavy burden on this Court and this community. Parenthetically, in preparation for this hearing Plaintiffs deposited approximately twenty thousand pages of documents on this Court and asked this Court to read them in order to prepare for the hearing of the Motion to Dismiss Pursuant to Doctrine of *Forum Non Conveniens*. Guatemala, on the other hand, has a paramount interest in this dispute and its courts are more appropriate for adjudicating the Plaintiffs' claims. Furthermore, the fact that Guatemalan law will govern this dispute adds to balance weighing in favor of the Guatemalan forum.

3. For the foregoing reasons, this cause is hereby dismissed pursuant to the doctrine of *forum non conveniens,* without prejudice, to the Plaintiffs re-filing their claims, at their option, in an alternate jurisdiction outside of Florida. The dismissal is subject to the following conditions:

a. the conditions set forth in Rule 1.061(c), Fla.R.Civ.P.; and,

b. the Defendants' agreement, individually and collectively, not to request the deposition or other testimony from any of the Plaintiffs which requires the Plaintiffs to be physically present in Guatemala. If the Defendants, individually or collectively, request the deposition or other testimony of any of the Plaintiffs in a Guatemalan legal proceeding, Plaintiffs must be permitted to give such deposition or testimony through a legal representative of the Plaintiffs or via some other acceptable procedure (e.g., videotaped testimony) whereby the Plaintiffs are not required to be physically present in Guatemala.

c. that should any Plaintiff be required to appear in person as a party or as a witness in Guatemalan by a Guatemalan court related to this claim, this Court will reconsider this ruling. This ruling is predicated upon the understanding that the Guatemalan system of justice and the workings of the courts in Guatemalan are quite different from the American system of jurisprudence. The Court understands that in Guatemala the presiding judge can determine the case based upon documents, affidavit and other pleadings and that the attendance of the parties as parties or as witnesses is not mandated. This Court further understands that the judge in Guatemalan has the option however of requiring a particular witness to appear if he or she desires. Because this Court is concerned

about the safety of the Plaintiffs who have been granted political asylum in this country, this Court would consider a Guatemalan court's requirement that one of the plaintiffs appear in person in any capacity to be a basis of reconsideration of this order.

4. The Court retains jurisdiction of this cause in the event any of the conditions of dismissal are not satisfied.

DONE and ORDERED in Chambers, in Miami, Florida on this day of March 30, 2005.

/s/_____
Ronald C. Dresnick
Circuit Court Judge

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